THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx. North.

UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-appeal-cases_1941

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

EX-OFFICIO MEMBERS.

RIGHT HON. SIR D. B. SOMERVELL, K.C., M.P.	ATTORNEY-GENERAL.
SIR T. J. O'CONNOR, K.C., M.P. . .	SOLICITOR-GENERAL.
LIEUT.-COLONEL S. T. MAYNARD, T.D., J.P.	President of the Law Society.

ELECTED MEMBERS.

Chairman—F. P. M. SCHILLER, Esq., K.C., Inner Temple.
Vice-Chairman—SIR HERBERT CUNLIFFE, K.C., Lincoln's Inn.

G. STANLEY POTT, Esq.	Law Society.
SIR JOSHUA SCHOLEFIELD, K.C.	Middle Temple.
G. DUDLEY COLCLOUGH, Esq.	Law Society.
MEYRICK J. L. BEEBEE, Esq.	Inner Temple.
J. H. STAMP, Esq.	Lincoln's Inn.
W. TREVOR WATSON, Esq., K.C.	Gray's Inn.
H. J. WALLINGTON, Esq., K.C.	Gray's Inn.
H. B. VAISEY, Esq., K.C.	Bar Council.
SIR WALTER T. MONCKTON, K.C.V.O., K.C.	Bar Council.
W. PRICE. Esq.	Middle Temple.

Secretary—P. NOBLE FAWCETT, Esq.,
Assistant Secretary—J. H. BOWMAN, Esq.,
6, Stone Buildings, Lincoln's Inn, London, W.C.2.

1941.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

Editor . . . RALPH SUTTON, K.C.
Assistant-Editor . G. F. L. BRIDGMAN, *Barrister-at-Law.*

Reporters.

House of Lords . .	J. S. HENDERSON,	*Barrister-at-Law.*
Privy Council . .	CHARLES CLAYTON,	*Barrister-at-Law.*

1941.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6, STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
Printed by WATERLOW & SONS LTD., LONDON WALL, LONDON.

BIBL. LONDIN UNIV.

JUDGES, LAW OFFICERS, ETC.

MEMORANDA.

1940.

Dec. 10. *This day* THE RIGHT HON. SIR HARRY TRELAWNEY EVE, *sometime a Judge of His Majesty's High Court of Justice, Chancery Division, died at Farnham, Surrey, aged* 84.

Dec. 15. *This day* THE RIGHT HON. SIR PHILIP MACDONELL, *a Member of the Judicial Committee of the Privy Council, died at Woodlyn, Gatehouse-on-Fleet, Kirkcudbrightshire, in his* 68*th year.*

1941.

Jan. 1. *This day* SIR CHARLES STAFFORD CROSSMAN, *a Justice of His Majesty's High Court of Justice, Chancery Division, died at Tetbury, Gloucestershire, aged* 70.

Jan. 21. AUGUSTUS ANDREWES UTHWATT, ESQ., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of Mr. Justice Crossman, deceased, and was afterwards knighted.*

Feb. 4. *A Barony was conferred upon* THE RIGHT HON. SIR FRANK BOYD MERRIMAN, O.B.E., *President of the Probate, Divorce and Admiralty Division of the High Court of Justice, by the name, style and title of Baron Merriman of Knutsford, in the County Palatine of Chester.*

Feb. 5. MR. JUSTICE UTHWATT *was appointed to exercise jurisdiction in company matters and in matters relating to removals or appeals under the Guardianship of Infants Acts in the place of the late Mr. Justice Crossman.*

Feb. 21. GEOFFREY HUGH BENBOW STREATFEILD, M.C., K.C., *was appointed to be Attorney-General of the County Palatine of Durham.*

June 30. *This day* THE RIGHT HON. LORD PARMOOR, *sometime a member of the Judicial Committee of the Privy Council, died, aged* 88.

July 18. THE RIGHT HON. HUGH PATTISON BARON MACMILLAN, G.C.V.O., *was appointed to be a Lord of Appeal in Ordinary under the provisions of the Appellate Jurisdiction Act,* 1876, *as amended by any subsequent enactment, in the place of the Right Hon. Viscount Maugham, resigned.*

July 22. *The dignity of a Barony of the United Kingdom was conferred upon* THE RIGHT HON. SIR WILFRID ARTHUR GREENE, O.B.E., *Master of the Rolls, by the name, style and title of Baron Greene, of Holmbury St. Mary, in the County of Surrey.*

Oct. 30. *This day* THE HON. SIR ANTHONY HAWKE. *a Justice of His Majesty's High Court of Justice, King's Bench Division, died suddenly at Chelmsford, aged* 72.

Oct. 31. *The Lord Chancellor nominated* MR. JUSTICE UTHWATT *as the nominated judge for the purposes of sect.* 94 *of the War Damage Act,* 1941.

Nov. 11. SIR (WILLIAM) NORMAN BIRKETT, K.C., *was appointed to be a Justice of His Majesty's High Court of Justice, King's Bench Division, in the place of Mr. Justice Hawke, deceased.*

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1941, will be as follows :—

In the First Series,
[1941] Ch.
In the Second Series,
[1941] 1 K. B. [1941] 2 K. B. [1941] P.
In the Third Series,
[1941] A. C.

The SCOTTISH LAW REPORTS are cited as follows :—

Shaw, or First Series	Court	of Session	Cases	by	S.
Dunlop, or, Second Series	,,	,,	,,	,,	D.
Macpherson, or, Third Series	,,	,,	,,	,,	M.
Rettie, or, Fourth Series	,,	,,	,,	,,	R.
Fraser, or, Fifth Series	,,	,,	,,	,,	F.
New Series	,,	,,	,,	,,	1907 S. C.
Scottish Law Reporter	,,	,,	,,	,,	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases				,,	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

A.

PAGE

Aotea District Maori Land Board, Hoani Te Heuheu Tukino *v.* – – – P. C. 308

Attorney-General for Palestine, Mohamed Selim (Prince), Heirs of *v.* – – P. C. 350

B.

Barclays Bank, Ld., United Australia, Ld. *v.* – H. L. (E.) 1

Barnard *v.* Gorman H. L. (E.) 378

Benham *v.* Gambling H. L. (E.) 157

C.

Canada Rice Mills, Ld. *v.* Union Marine & General Insurance Co., Ld. – – – P. C. 55

PAGE

Cooper, Luxor (Eastbourne), Ld. *v.* – – – H. L. (E.) 108

D.

Dairen Kisen Kabushiki Kaisha *v.* Shiang Kee (otherwise known as The China Merchants Steam Navigation Co., Ld.) – – – – P. C. 373

Dillon *v.* Public Trustee of New Zealand – – – P. C. 294

E.

East Suffolk Rivers Catchment Board *v.* Kent – H. L. (E.) 74

F.

PAGE

Ford Motor Company of Canada, Ld., Windsor Education Board v. – – – – P. C. 453

G.

Gambling, Benham v. H. L. (E.) 157
Gorman, Barnard v. H. L. (E.) 378
Griffiths v. Smith – H. L. (E.) 170

H.

Hall v. Kingston & St. Andrew Corporation – – P. C. 284
Hickman, Potts v. – H. L. (E.) 212
Hoani Te Heuheu Tukino v. Aotea District Maori Land Board – – – P. C. 308

I.

International Railway Co. v. Niagara Parks Commission P. C. 328

J.

Jaber Elias Kotia v. Katr Bint Jiryes Nahas – – P. C. 403

K.

Katr Bint Jiryes Nahas, Jaber Elias Kotia v. – – P. C. 403
Kent, East Suffolk Rivers Catchment Board v. H. L. (E.) 74
King Features Syndicate, Incorporated v. Kleeman (O. & M.), Ld. – – – H. L. (E.) 417
Kingston & St. Andrew Corporation, Hall v. – – P. C. 284
Kleeman (O. & M.), Ld., King Features Syndicate, Incorporated v. – – H. L. (E.) 417
Kotia, Jaber Elias v. Nahas Katr Bint Jiryes – – P. C. 403

L.

Luxor (Eastbourne), Ld. v. Cooper – – H. L. (E.) 108

M.

PAGE

Michel Habib Raji Ayoub v. Sheikh Suleiman El Taji El Farouqi – – – P. C. 274
Mohamed Selim (Prince), Heirs of v. Attorney-General for Palestine – – – P. C. 350

N.

Nahas, Katr Bint Jiryes, Kotia, Jaber Elias v. – – P. C. 403
New Zealand, Public Trustee of, Dillon v. – – – P. C. 294
Niagara Parks Commission, International Railway Co. v. P. C. 328

O.

Ouston (H. C. & J. G.), Scammell (G.) & Nephew, Ld. v. – – H. L. (E.) 251

P.

Potts v. Hickman – H. L. (E.) 212
Public Trustee of New Zealand, Dillon v. – – – P. C. 294

S.

Sardar Rustam Khan, Secretary of State for India v. P. C. 356
Scammell (G.) & Nephew, Ld. v. Ouston (H. C. & J. G.) H. L. (E.) 251
Secretary of State for India v. Sardar Rustam Khan – P. C. 356
Sheikh Suleiman El Taji El Farouqi, Michel Habib Raji Ayoub v. – – – P. C. 274
Shiang Kee (otherwise known as The China Merchants Steam Navigation Co., Ld.), Dairen Kisen Kabushiki Kaisha v. P. C. 373
Smith, Griffiths v. – H. L. (E.) 170

U.

PAGE

Union Marine & General Insurance Co., Ld., Canada Rice Mills, Ld. *v.* – – P. C. 55
United Australia, Ld. *v.* Barclays Bank, Ld. – – H. L. (E.) 1

W.

PAGE

Windsor Education Board *v.* Ford Motor Company of Canada, Ld. – – P. C. 453

CASES AFFIRMED, REVERSED, FOLLOWED, OVERRULED OR JUDICIALLY COMMENTED ON.

Barnard v. *Gorman* [1940] 2 K. B. 570
Reversed - - **H. L. (E.) 378**

Birch v. *Joy* - - (1852) 3 H. L. Cas. 565
Referred to. International Railway Co. *v.* Niagara Parks Commission - - - **J. C. 328**

Bowditch v. *Balchin* - (1850) 5 Ex. 378
Discussed. Barnard *v.* Gorman **H. L. (E.) 378**

Butler v. *Wildman* (1820) 3 B. & Ald. 398
Approved. Canada Rice Mills, Ld. *v.* Union Marine and General Insurance Co., Ld. - **J. C. 55**

Canada Rice Mills, Ld. v. *Union Marine and General Insurance Co., Ld.*
Judgment of C. A. for British Columbia reversed - **J. C. 55**

Cook v. *Sprigg* - - [1899] A. C. 572, 578
Referred to. Secretary of State *v.* Sardar Rustam Khan **J. C. 356**

Dillon v. *Public Trustee of New Zealand* [1939] N. Z. L. R. 550.
Reversed - - - **J. C. 294**

East Suffolk Rivers Catchment Board v. *Kent and another* [1940] 1 K. B. 319
Reversed - - **H. L. (E.) 74**

Gilbert v. *Corporation of Trinity House* (1886) 17 Q. B. D. 795.
Dictum of Day J. at p. 801 commented on. International Railway Co. *v.* Niagara Parks Commission - - - **J. C. 328**

Hamilton, Fraser & Co. v. *Pandorf & Co.* (1887) 12 App. Cas. 518.
Referred to. Canada Rice Mills Ld. *v.* Union Marine and General Insurance Co., Ld. - **J. C. 55**

Heirs of Prince Mohamed Selim v. *Attorney-General for Palestine* (1939) Pal. L. R. 8.
Affirmed in part - - **J. C. 350**

Hickman v. *Potts* - - [1940] 1 K. B. 29
Reversed - - **H. L. (E.) 212**

Hoani Te Heuheu Tukino v. *Aotea District Maori Land Board* [1939] N. Z. L. R. 107.
Affirmed - **J. C. 308**

International Railway Co. v. *Niagara Parks Commission* [1940] O. R. 33.
Reversed - - - **J. C. 328**

Isaacs v. *Keech* - - [1925] 2 K. B. 354
Discussed. Barnard *v.* Gorman **H. L. (E.) 378**

King Features Syndicate Incorporated v. *O. & M. Kleeman, Ld.* [1940] Ch. 806.
Reversed - - **H. L. (E.) 417**

Knight of St. Michael, The - [1898] P. 30
Approved. Canada Rice Mills, Ld. *v.* Union Marine and General Insurance Co., Ld. - **J. C. 55**

Labrador Co. v. *The Queen* [1893] A. C. 104.
Principal at p. 123 applied. Hoani Te Heuheu Tukino *v.* Aotea District Maori Land Board **J. C. 308**

Lazard Bros. & Co. v. *Midland Bank* [1933] A. C. 289, 297.
Referred to. Dairen Kisen Kabushiki Kaisha *v.* Shiang Kee **J. C. 373**

McGovern v. *James Nimmo & Co.* (1938) 107 L. J., P. C. 82.
Decision not applicable to English or British Columbia appeals. Canada Rice Mills, Ld. *v.* Union Marine and General Insurance Co., Ld. - - - **J. C. 55**

Mountain v. *Whittle* - [1921] 1 A. C. 615
Referred to. Canada Rice Mills, Ld. *v.* Union Marine and General Insurance Co., Ld. - **J. C. 55**

Prickett v. *Badger* (1856) 1 C. B. (N. S.) 296.
Distinguished. Luxor (Eastbourne), Ld. and Others *v.* Cooper - - **H. L. (E.) 108**

Russian Bank for Foreign Trade, In re [1933] 1 Ch. 745.
Referred to. Dairen Kisen Kabushiki Kaisha *v.* Shiang Kee **J. C. 373**

Secretary of State for India v. *Bai Rajbai* (1915) L. R. 42 I. A. 229, 237.
Referred to. Secretary of State *v.* Sardar Rustam Khan **J. C. 356**

Secretary of State in Council of India v. *Kamachee Boye Sahaba* (1859) 7 Moo. I. A. 476, 540.
Referred to. SECRETARY OF STATE *v.* SARDAR RUSTAM KHAN **J. C. 356**

Smith v. *Baker* - (1873) L. R. 8 C. P. 350
Dictum of Bovill C.J. at p. 355, disapproved and not followed. UNITED AUSTRALIA, LD. *v.* BARCLAYS BANK, LD. **H. L. (E.) 1**

Stanley v. *Western Insurance Co.* (1868) L. R. 3 Ex. 71.
Dictum of Kelly C.B., at p. 74, approved. CANADA RICE MILLS, LD. *v.* UNION MARINE AND GENERAL INSURANCE CO., LD. - **J. C. 55**

Toronto City Corporation v. *Toronto Railway Corporation* [1925] A. C. 177.
Followed. INTERNATIONAL RAILWAY CO. *v.* NIAGARA PARKS COMMISSION - - - - **J. C. 328**

Trebeck v. *Croudace* [1918] 1 K. B. 158.
Discussed. BARNARD *v.* GORMAN **H. L. (E.) 378**

Trollope & Sons v. *Caplan* [1936] 2 K. B. 382.
Held by Lord Romer to have been wrongly decided. LUXOR (EASTBOURNE), LD. AND OTHERS *v.* COOPER - - - **H. L. (E.) 108**

Trollope & Sons v. *Martyn Brothers* [1934] 2 K. B. 436.
Dissenting judgment of Scrutton L.J. approved. LUXOR (EASTBOURNE), LD. AND OTHERS *v.* COOPER - - - **H. L. (E.) 108**

United Australia, Ld. v. *Barclays Bank, Ld.* [1939] 2 K. B. 53.
Reversed - - **H. L. (E.) 1**

Vajesingji Joravarsingji v. *Secretary of State for India* (1924) L. R. 51 I. A. 357, 360.
Referred to. SECRETARY OF STATE *v.* SARDAR RUSTAM KHAN **J. C. 356**
Principle at p. 360 applied. HOANI TE HEUHEU TUKINO *v.* AOTEA DISTRICT MAORI LAND BOARD **J. C. 308**

Verschures Creameries, Ld. v. *Hull & Netherlands Steamship Co., Ld.* [1921] 2 K. B. 608.
Distinguished by Viscount Simon L.C. UNITED AUSTRALIA, LD. *v.* BARCLAYS BANK, LD. **H. L. (E.) 1**

Wilson, Sons & Co. v. *Owners of Cargo per the "Xantho"* (1887) 12 App. Cas. 503, 509.
Referred to. CANADA RICE MILLS, LD. *v.* UNION MARINE AND GENERAL INSURANCE CO., LD. - **J. C. 55**

Windsor Education Board v. *Ford Motor Co. of Canada, Ld.* [1939] S. C. R. (Can.) 412.
Reversed - - - **J. C. 453**

ORDINANCES JUDICIALLY CONSIDERED.

Hong Kong.

Companies Ordinance. No. 39 of 1932, s. 313, sub-ss. 1, 2. DAIREN KISEN KABUSHIKI KAISHA *v.* SHIANG KEE **J. C. 373**

Palestine.

Land (*Settlement of Title*) Ordinance, 1928-39, ss. 43, 66. HEIRS OF PRINCE MOHAMED SELIM *v.* ATT.-GEN. FOR PALESTINE - **J. C. 350**

Succession Ordinance, 1923 (c. 135 of the Laws of Palestine, 1933), ss. 2, 3, 4, 11. JABER ELIAS KOTIA *v.* KATR BINT JIRYES NAHAS **J. C. 403**

RULES AND ORDERS JUDICIALLY CONSIDERED.

PALESTINE ORDER IN COUNCIL, No. 1282 of 1922, art. 46. MICHEL HABIB RAJI AYOUB *v.* SHEIK SULEIMAN EL TAJI EL FAROUQI - - **J. C. 274**

—— —— **arts. 46, 51, 58, 59, 64.** JABER ELIAS KOTIA *v.* KATR BINT JIRYES NAHAS - - - - **J. C. 403**

SUPREME COURT RULES, Order LVIII., r. 4. CANADA RICE MILLS, LD. *v.* UNION MARINE AND GENERAL INSURANCE CO., LD. - **J. C. 55**

STATUTES JUDICIALLY CONSIDERED.

I. IMPERIAL.

1709.

8 Anne, c. 14 (*Landlord and Tenant*), s. 1. POTTS *v.* HICKMAN - **H. L. (E.) 212**

1840.

12 & 13 Vict. c. 14 (*Distress for Rates*), s. 1. POTTS *v.* HICKMAN - **H. L. (E.) 212**

1852.

15 & 16 Vict. c. 72 (*New Zealand Constitution*), s. 73. HOANI TE HEUHEU TUKINO *v.* AOTEA DISTRICT MAORI LAND BOARD - - **J. C. 308**

1862.

25 & 26 Vict. c. 48 (*Establishment and Government of Provinces in New Zealand*), s. 8. HOANI TE HEUHEU TUKINO *v.* AOTEA DISTRICT MAORI LAND BOARD - - - **J. C. 308**

1876.

39 & 40 Vict. c. 36 (*Customs Consolidation*), s. 186. BARNARD *v.* GORMAN **H. L. (E.) 378**

1890.

53 & 54 Vict. c. 37 (*Foreign Jurisdiction*), s. 1. SECRETARY OF STATE *v.* SARDAR RUSTAM KHAN - **J. C. 356**

1893.

56 & 57 Vict. c. 61 (*Public Authorities Protection*), s. 1. GRIFFITHS *v.* SMITH - - - **H. L. (E.) 170**

1907-1932.

Patents & Designs Acts. KING FEATURES SYNDICATE INCORPORATED *v.* O. & M. KLEEMAN, LD. **H. L. (E.) 417**

1911.

1 & 2 Geo. 5, c. 46 (*Copyright*), ss. 1; 22, sub-s. 1. KING FEATURES SYNDICATE INCORPORATED *v.* O. & M. KLEEMAN, LD. - **H. L. (E.) 417**

1930.

20 & 21 Geo. 5, c. 44 (*Land Drainage*), ss. 34, 81. EAST SUFFOLK RIVERS CATCHMENT BOARD *v.* KENT AND ANOTHER - - **H. L. (E.) 74**

II. DOMINIONS AND COLONIES.

Canada.

1936.

Marine Insurance Act, R. S. B. C., c. 134, s. 57; Sch., r. 7. CANADA RICE MILLS, LD. *v.* UNION MARINE AND GENERAL INSURANCE CO., LD. **J. C. 55**

1937.

Separate Schools Act, R. S. O. (c. 362), s. 66, sub-ss. 1, 3. WINDSOR EDUCATION BOARD *v.* FORD MOTOR COMPANY OF CANADA, LD. **J. C. 453**

Jamaica.

1925.

Public Health Law (No. 18), s. 89, sub-ss. 1, 2.

1931.

Kingston and St. Andrew Corporation Law (No. 12), s. 223. HALL *v.* KINGSTON AND ST. ANDREW CORPORATION - - - **J. C. 284**

New Zealand.

1908.

Family Protection Act (No. 60), s. 33, sub-s. 1. DILLON *v.* PUBLIC TRUSTEE OF NEW ZEALAND - - **J. C. 294**

1935.

Native Purposes Act, s. 14. HOANI TE HEUHEU TUKINO *v.* AOTEA DISTRICT MAORI LAND BOARD - **J. C. 308**

Palestine.

Ottoman Code of Civil Procedure, arts. 111, 112. MICHEL HABIB RAJI AYOUB *v.* SHEIKH SULEIMAN EL TAJI EL FAROUQI - - - **J. C. 274**

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

UNITED AUSTRALIA, LIMITED . . . APPELLANTS ;

AND

BARCLAYS BANK, LIMITED . . . . RESPONDENTS.

H. L. (E.)*

1940

May 28, 29; *June* 3; *Aug.* 20.

Conversion—Alternative remedies in contract and tort—Writ issued in contract against one defendant, but action discontinued—Whether a bar against another defendant.

A cheque payable to the appellants was converted by the M. company and collected for that company by its bankers, the B. bank. The appellants brought an action against the M. company for the amount of the cheque either as money lent or as money had and received to the use of the appellants, but they discontinued that action and no final judgment was obtained. The appellants afterwards brought the present action against the B. bank for conversion of the cheque :—

Held, that the appellants by merely initiating proceedings against the M. company for money lent or for money had and received had not thereby elected to waive the tort so as to be precluded from bringing the present action in tort. In such a

---

* *Present :* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD ROMER, and LORD PORTER.

H. L. (E.)
1940
UNITED AUSTRALIA, LD.
v.
BARCLAYS BANK, LD.

case it is judgment and satisfaction in the first action, and not merely the bringing of the claim, which constitutes a bar to a second action.

Dictum of Bovill C.J. in *Smith* v. *Baker* (1873) L. R. 8 C. P. 350, 355, disapproved and not followed. *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co., Ld.* [1921] 2 K. B. 608 distinguished.

Decision of the Court of Appeal [1939] 2 K. B. 53 reversed, and judgment entered for the appellants for 1900*l.* with interest at four per cent. as from November 12, 1934.

APPEAL from a decision of the Court of Appeal (1) affirming a decision of Goddard J.

In November, 1934, certain debtors of United Australia, Ld. (hereinafter called "the appellants"), sent to them a crossed cheque for 1900*l.*, payable to their order. On November 12 that cheque, purporting to have been indorsed in the name of the appellants by one A. H. Emons, their secretary, in favour of the M. F. G. Trust, Ld. (hereinafter called "M. F. G."), was presented at a branch of the respondent bank, for payment into the account of M. F. G., at that branch, and the amount thereof was shortly afterwards collected, received, and paid by the respondents.

On May 13, 1935, the appellants, who alleged that Emons had indorsed the cheque without their authority, issued a writ against M. F. G., claiming 1900*l.* as money lent by the appellants to M. F. G. or as money had and received to the appellants' use. The appellants obtained an interlocutory judgment, but this was afterwards set aside, and the action never came to final trial. M. F. G. afterwards went into liquidation, and on December 10, 1935, the appellants put in a proof in the liquidation for money lent, but the proof had not yet been admitted.

On November 8, 1937, the appellants brought the present action against the respondents, claiming 1900*l.* as damages for conversion of the cheque, or, alternatively, for negligence, thus setting up as against the respondents that the dealings of Emons, M. F. G., and the respondents, had been tortious.

---

(1) [1939] 2 K. B. 53.

H. L. (E.)

1940

UNITED AUSTRALIA, LD. *v.* BARCLAYS BANK, LD.

On May 25, 1938, Goddard J., considering himself bound by the decision in *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co., Ld.* (1), held, in effect, that the appellants, having made a claim for breach of contract only in their action in 1935 against M. F. G., and a similar claim in their proof in the subsequent liquidation, had waived their right to claim in tort, and consequently, even if Emons had acted without their authority, they could not succeed in the action. Accordingly, he gave judgment for the present respondents.

On appeal, the Court of Appeal (Scott, Clauson and du Parcq L.JJ.) held that the present appellants, by bringing the first action for breach of contract only, had elected to waive their right to bring the second action for tort, notwithstanding that the first action had not proceeded to judgment, and that the present respondents in the second action had not been made defendants in the first action.

United Australia, Ld., appealed to this House.

A. T. Denning K.C. and *M. A. B. King-Hamilton* for the appellants. Election at common law may be either between inconsistent rights or between alternative remedies. In the former case any unequivocal act done with full knowledge is final as against everyone; in the latter case nothing short of judgment or satisfaction is final as against third parties. This distinction is clearly drawn in the Restatement of the Law of Restitution by the American Law Institute, articles 144, 147. Instances of election between inconsistent rights are: to avoid a lease under a proviso for re-entry or to affirm it, to avoid a contract voidable for fraud or to affirm it, to hold either agent or principal liable on a contract made in the agent's name. Another instance is ratification in the true sense; that is when an act is professedly done on behalf of a principal but in fact without his authority, in which case the principal can at his election ratify the act or not. *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co., Ld.* (1), was a case of true ratification, and there Atkin L.J. put it

---

(1) [1921] 2 K. B. 608.

H. L. (E.)
1940
UNITED AUSTRALIA LD.
v.
BARCLAYS BANK, LD.

on that very ground. The present case is not one of true ratification. Instances of election between alternative remedies are: in the old law when a chattel was wrongfully taken and converted there were alternative remedies in trover or trespass; in the modern as well as in the old law when a carrier misdelivers a chattel there are alternative remedies in conversion or breach of contract, or when a passenger, or goods are injured in transit, there are alternative remedies in negligence or breach of contract. In such cases the rights of the parties have always been governed by the substance of the matter irrespective of the form of the action which is employed. A plaintiff who asks for one remedy can discontinue or amend it and claim the other, or he can claim the two remedies alternatively. Nothing short of judgment is final as against the same defendant. If judgment is obtained but is unsatisfied the plaintiff can proceed against any other tortfeasor, as, for example, where there is misdelivery by a carrier and subsequent conversions by successive recipients, the plaintiff can obtain successive judgments against each until he gets satisfaction, but he cannot get more than one compensation. The present case is one of alternative remedies. Under the former system of pleading when a man's chattel was wrongfully converted and sold he could sue in trover for damages or in indebitatus assumpsit for the proceeds as money had and received to his use. This was recognized by the old common lawyers as a case of alternative remedies. At that time the two remedies could not be included in one action. Thus a count in trover could not be joined with a count in assumpsit; but a plaintiff could discontinue the one form and bring the other. It was early held that as against the same defendant nothing short of judgment was final: *Lamine* v. *Dorrell* (1); *Hitchin* (or *Kitchen*) v. *Campbell.* (2) If the plaintiff sued in indebitatus assumpsit he was said to "waive the tort," but this was only a short way of saying that he waived the form of remedy in tort. The plaintiff did not in fact waive any wrong, because it was only by reason of the wrong that he could establish a cause of action

(1) (1705) 2 Ld. Raym. 1216.

(2) (1772) 2 Wm. Bl. 827.

at all. He could not make out any contract. The assumpsit was a mere fiction, the substance of the claim being the wrong done. The plaintiff did not affirm the sale as being rightful or as being done on his behalf: *Hunter* v. *Prinsep* (1); *Young* v. *Marshall.* (2) *Smith* v. *Hodson* (3) is distinguishable because there the indebitatus assumpsit for goods delivered was an affirmation of a real contract and is an instance of election between inconsistent rights. In his notes Mr. J. W. Smith recognized that election between alternative remedies was on a different footing: see Smith's Leading Cases, 13th ed., p. 151. By s. 49 of the Common Law Procedure Act, 1852, in an action for money had and received the fiction of a promise has gone even as a matter of pleading, and by the Judicature Act, 1875, only material facts are to be pleaded. Since those statutes there is no justification for treating the action for money had and received as founded on an imputed promise or as a waiver of a tort, although some judges in modern times have so treated it. Bovill C.J.'s dictum in *Smith* v. *Baker* (4) that "if an action "for money had and received is so brought, that is in point "of law a conclusive election to waive the tort," is wrong; and A. L. Smith L.J. was wrong in following it in *Rice* v. *Reed.* (5) In the latter case Lord Russell C.J. and Vaughan Williams L.J. were right in saying that nothing short of judgment would suffice, but were wrong in intimating that judgment for money had and received against one person would be a bar to an action against a third person. Nothing short of satisfaction is a bar. Lord Sumner's dictum in *Sinclair* v. *Brougham* (6) that "all these causes of action are "common species of the genus assumpsit. All now rest, and "have long rested, upon a notional or imputed promise to "repay" is also, we submit, wrong, mistaking as it does the shadow for the substance. The substance was the debt, that is, the obligation to pay over the money which was an obligation imposed by law. The promise was a fiction. We

(1) (1808) 10 East, 378.
(2) (1831) 8 Bing. 43.
(3) (1791) 4 Term. Rep. 211.
(4) (1873) L. R. 8 C. P. 350, 355.
(5) [1900] 1 Q. B. 54, 66.
(6) [1914] A. C. 398, 452.

H. L. (E.)
1940
United Australia, Ld. *v.* Barclays Bank, Ld.

adopt as part of our argument Lord Wright's essay on *Sinclair* v. *Brougham.* (1) The plaintiffs here have throughout simply claimed their money and should not be defeated by a fiction.

G. H. B. Streatfeild K.C. and *Clive Burt* for the respondents. It is a well established principle of English law that a plaintiff cannot waive a tort against one defendant and afterwards, not having obtained satisfaction, sue another defendant in respect of the same matter. Election between two possible causes of action is a question of fact, and a plaintiff having made his election cannot afterwards have recourse to a different cause of action in respect of the same matter. Here there was an unequivocal choice made by the present appellants upon which they cannot go back. As Bovill C.J. said in *Smith* v. *Baker* (2) " the law is clear that a person "who is entitled to complain of a conversion of his property, "but who prefers to waive the tort, may do so and bring his "action for money had and received for the proceeds of goods "wrongfully sold. The law implies, under such circumstances, "a promise on the part of the tortfeasor that he will pay "over the proceeds of the sale to the rightful owner. But if "an action for money had and received is so brought, that "is in point of law a conclusive election to waive the tort; "and so the commencement of an action of trespass or trover "is a conclusive election the other way." In the same case Honyman J. said that " a man cannot at the same time blow "hot and cold," and therefore cannot, having elected to pursue one remedy, afterwards have recourse to another. In *Scarf* v. *Jardine* (3) Lord Blackburn said (4) " where "there is a right to elect the party is not bound to elect at "once; he may wait and think which way he will exercise "his election, so long as he can do so without injuring other "persons . . . . but when he has once fully elected it is "final." Here it has been found by Goddard J. that there was an unequivocal act of election, and that enured for the benefit of the respondents. *Verschures Creameries, Ld.* v.

---

(1) [1914] A. C. 398, 452.
(2) L. R. 8 C. P. 350, 355.
(3) (1882) 7 App. Cas. 345.
(4) Ibid. 360.

H. L. (E.)

1940

UNITED AUSTRALIA, LD. v. BARCLAYS BANK, LD.

Hull and Netherlands Steamship Co., Ld. (1), supports the view for which we contend.

A. T. Denning K.C. in reply. The action for money had and received is founded on a concept of property, that is, that the money belongs in justice and equity to the plaintiff: *Foster* v. *Stewart* (2); Bullen and Leake, 3rd ed., p. 44. Nothing short of satisfaction is a bar to an action against a third person: *Morris* v. *Robinson.* (3) As to the fiction of a promise we adopt the words of Professor Keener in his work on Quasi Contract, p. 212, that "the fiction having "been adopted for the purpose of giving a remedy under a "system in which forms were paramount, it should not be "used for the purpose of denying a remedy. And certainly "its use for such a purpose cannot be justified in a jurisdiction "where forms of action are no longer recognised, the substance "being everything and the form nothing"; see also per Professor Corbin in 19 Yale Law Journal, pp. 239–241.

The House took time for consideration.

1940. Aug. 20. VISCOUNT SIMON L.C. My Lords, the appellant company was the plaintiff in an action brought against the respondent bank in the following circumstances. A company called Lower Ancobra (Gold Coast) Areas, Ld., owed the appellants a sum of 1900*l.*, and in payment drew a cheque for that amount making it payable to the appellant company or order. The appellant company had a secretary named Emons, who had authority to indorse cheques for the purpose of paying them into the appellant company's bank account, but had no authority to indorse cheques specially on behalf of the appellant company for the purpose of enabling payment to be made to a third party. Emons, purporting to act on the appellant company's behalf, specially indorsed the cheque so as to make it payable to the M. F. G. Trust, Ld. (hereinafter called "M. F. G."), of which Emons was a director. Thereupon M. F. G. indorsed the cheque and paid it into its account at the respondent bank. The respondent bank knew that Emons, besides being secretary of the appellant company, was a director of M. F. G., but without making any enquiries the bank collected the proceeds of the cheque and placed them to the credit of M. F. G.'s account.

---

(1) [1921] 2 K. B. 608.

(2) (1814) 3 M. & S. 191, 200.

(3) (1824) 3 B. & C. 196.

By writ issued on November 8, 1937, the appellant company sued the respondent bank for (1.) damages for conversion; (2.) alternatively, damages for negligence; (3.) in the further alternative, for 1900*l.* as money had and received by the defendants to the use of the plaintiffs. The respondent bank in its defence claimed to be protected from liability by s. 82 of the Bills of Exchange Act, 1882, but it did not attempt at the trial to establish that defence and it became common ground that the circumstances in which the respondent bank had dealt with the cheque were such as would make it liable to the appellant company for the 1900*l.*, unless it was relieved from liability in consequence of earlier proceedings taken by the appellant company in an endeavour to recover the 1900*l.* from M. F. G. The nature and course of these earlier proceedings must now be stated.

It was not till some time after the misapplication of the cheque that the appellant company discovered anything about it. Neither the receipt of the 1900*l.*, nor the paying away of that amount, was reported to the Board. Nothing relating to the transaction was to be found in the books of the company until Emons subsequently told the accountants, who were writing up the appellant company's books, to make entries showing under date November 12, 1934, the receipt of 1900*l.* from Lower Ancobra (Gold Coast) Areas, Ld., and a contemporaneous loan of the same amount to M. F. G. On May 13, 1935, the appellant company issued a writ against M. F. G. claiming the 1900*l.* as "money lent," or alternatively as "money had and received" by M. F. G. to the use of the appellant company. It will be observed that the appellant company at the time had no knowledge of the cheque, or of how any such cheque had been dealt with by the respondent bank. On May 22, 1935, the appellant company signed judgment against M. F. G. in default of appearance, but the judgment was shortly afterwards set aside on the application of M. F. G. In support of this application Emons made an affidavit on behalf of M. F. G. and swore that the money was not lent by the appellant company to M. F. G., and that M. F. G. did not receive it for the use of the appellant company. The defence delivered by M. F. G. repeated these statements. On October 28, 1935, on the petition of another creditor, a winding-up order was made against M. F. G. The action by the appellant company against M. F. G. was thereupon automatically stayed before trial and no judgment was ever obtained. On December 10, 1935, the appellant company signed an affidavit of proof of debt in the liquidation of M. F. G. stating that M. F. G. was indebted to the amount of 1900*l.* to the appellant company for money lent or money had and received, but this proof was never admitted. There was thus never any recovery, either by judgment or otherwise, of any part of the sum claimed from M. F. G.

In the course of the proceedings against M. F. G., the appellant company learned that a cheque for 1900*l.* had been indorsed over by Emons to M. F. G., and in June, 1935, they obtained a copy of the cheque which showed that it had been cleared through the respondent bank. Hence the present action.

The question to be decided in this appeal is whether the proceedings against M. F. G., carried on up to the point that they in fact reached, constitute a valid ground of defence for the respondent bank and so relieve it in the present action from a liability, which would otherwise certainly attach to it, to repay to the appellant company the sum of 1900*l.* of which they had been deprived and which they have not received from any other source.

The view taken by the Courts below is that the appellant company, by bringing their action against M. F. G., elected to "waive the tort" and thereby became irrevocably committed, even against a different defendant, to the view that Emons was, as he professed to be, duly authorised as the appellant company's agent to deal with the cheque as he did. If so, the Bank's dealing with the cheque was not tortious and the present action would fail.

Goddard J. (as he then was), who tried the action, was conscious that such a conclusion might seem, as a matter of justice and common sense, difficult to accept, for he said: "It is not easy to see why this act of suing the M. F. G. Trust "for the money lent should enure to the benefit of the Bank, "who were not parties to that action and who in no way "altered their position in consequence of any action which "United Australia took in suing the M. F. G. Trust; but it "seems to me that I have no option but to hold that the "action of so doing does free the Bank, because now it cannot "be said that the dealing in the cheque was tortious, and if "the dealing in the cheque was not tortious, if it was not "conversion, then the Bank cannot be guilty of any wrong in "the matter." It was thus the issue of the writ against M. F. G. which the learned judge regarded as sufficient to provide the bank with a valid defence.

Clauson L.J. who delivered the judgment of the Court of Appeal, followed a similar line of reasoning. He said: " The "claim for money lent involved the position that there had "never been any tort at all, but that the 1900*l.*, in the form "of a cheque specially endorsed to M. F. G., had been properly "passed by Emons to M. F. G. by way of loan. The claim for "money had and received did, however, involve the position "that there had been a tortious acquisition of the money by "M. F. G., but also involved a waiver of the tort, and an "election to claim against the defendants (the M. F. G. Trust) "in 'assumpsit,' i.e., on the footing of a quasi-contractual "liability to refund." Thus the Court of Appeal also regarded the initiation of the action against M. F. G. as a conclusive election which prevented the appellants from alleging thereafter that the Bank had converted the cheque.

The House has now to decide whether the Courts below are right in holding that the appellants are barred from recovering judgment against the bank because they previously instituted proceedings, on the basis of " waiving the tort " against M. F. G., when those proceedings never produced any judgment or satisfaction in the plaintiff's favour. This question may be conveniently dissected by first asking whether there would be any such bar even if the present action was an action in tort against M. F. G. If a remedy in tort would remain open against the same defendant, then there certainly cannot have been any conclusive election which could prevent an action against a different defendant who had previously not been sued at all.

The process known as " waiving the tort " can be traced back to the latter half of the seventeenth century, when much accurate learning and refined analysis were addressed to determining what were the appropriate forms of action in which a claim could, or should, be embodied. Thus, in 1678, in the case of *Howard* v. *Wood* (1) the plaintiff brought his claim in assumpsit for fees due to him as steward of the Honor of Pomfret against a defendant who had received the fees under a subsequent grant of the office which was no longer valid. It was objected " that this action will not lie for the "money received by the defendant as money received for "the plaintiff's use, because the defendant claimed title by "another grant made to himself and therefore received it "to his own use ; and that the plaintiff should have brought "an action of trover for the money, or case, for disturbing "him in his office." To this the Court of King's Bench answered : " That it might be hard perhaps to maintain it, "if this were a new case, and the first of this nature ; but "they said two or three actions of this kind had been held "before, and cited a case between *Bradshaw* and *Porter*, of "Grays Inn, for money received as judge of the Sheriff's "Court of London to be so resolved ; and therefore it would "be hard now to adjudge the contrary." In the previous year, 1677, a similar objection to the plaintiff proceeding in assumpsit to recover the profits of an office, which had wrongly been received by the defendant, was overruled by the Court of Exchequer in *Arris & Arris* v. *Stukely* (2), where the argument of the Solicitor-General, Sir Francis Winnington, is thus reported. " An indebitatus assumpsit would lie here ; for

(1) (1679) 2 Levinz 245.

(2) (1677) 2 Mod. 260, 262.

"where one receives my rent, I may charge him as bailiff or "receiver; or if any one receive my money without my "order, though it is a tort yet an indebitatus will lie, because "by reason of the money, the law creates a promise; and the "action is not grounded on the tort, but on the receipt of the "profits in this case."

Another example of the same objection being overruled is found in *Lamine* v. *Dorrell* (1), where an administrator of an estate sued in assumpsit to recover proceeds, which had been gathered in by a former administrator whose appointment had been revoked. In that case Powell J. said: "It is clear "the plaintiff might have maintained detinue or trover for the "debentures, but when the act that is done is in its nature "tortious, it is hard to turn that into a contract, and against "the reason of assumpsits. But the plaintiff may dispense "with the wrong, and suppose the sale made by his consent, "and bring an action for the money they were sold for, as "money received to his use. It has been carried thus far "already." And Holt C.J. said (2): "these actions have "crept in by degrees" and added "he could not see how it "differed from an indebitatus assumpsit for the profits of an "office by a rightful officer against a wrongful, as money had "and received by the wrongful officer to the use of the rightful."

It is not necessary in this connection to discuss the logical basis of the writ of indebitatus assumpsit; my noble and learned friend, Lord Wright, has submitted it to searching analysis in his essay on the decision of this House, a quarter of a century ago, in *Sinclair* v. *Brougham* (3) (Legal Essays and Addresses by Lord Wright of Durley, Cambridge University Press, p. 1). Suffice it to say that the device of "waiving the "tort" and suing in assumpsit soon spread. A learned author includes among torts which can be waived, conversion, trespass to land or goods, deceit, occasionally action upon the case, and the action for extorting money by threats. (Winfield on "The Province of the Law of Tort," p. 169.) An extreme instance is provided in *Lightly* v. *Clouston* (4), where the defendant had wrongfully taken the plaintiff's apprentice into his employment, and the plaintiff, instead of suing for seduction, successfully claimed in assumpsit against the defendant who had tortiously employed him. "This case," said Mansfield C.J. (1) "approaches as nearly as possible "to the case where goods are sold, and the money has found "its way into the pocket of the defendant." Six years later Lord Ellenborough, in *Foster* v. *Stewart* (2), doubted whether this was not going too far. At any rate, it is clear that there are torts to which the process of waiver could not be applied; the tort of defamation, for example, or of assault, could not be dressed up into a claim in assumpsit.

---

(1) 2 Ld. Raym. 1216.
(2) Ibid. 1217.
(3) [1914] A. C. 398.
(4) (1808) 1 Taunt. 112.

Where "waiving the tort" was possible, it was nothing more than a choice between possible remedies derived from a time when it was not permitted to combine them or to pursue them in the alternative, and when there were procedural advantages in selecting the form of assumpsit. For example, there were no pitfalls in drawing the declaration in assumpsit, and the cause of action did not drop with death; on the other hand, there were advantages for the defendant, too, for an action framed in assumpsit permitted the defendant to plead the general issue (Stephen's Principles of Pleading, 2nd ed., 1827, p. 197).

Lamine v. *Dorrell* (3) contains the first judicial reference which I have been able to find to the effect of success in pursuing one form of action in barring proceedings under the other. For Holt C.J. observes, "if an action of trover "should be brought by the plaintiff for these debentures "after judgment in this indebitatus assumpsit, he may plead "this recovery in bar of the action of trover, in the same "manner as it would have been a good plea in bar for the "defendant to have pleaded to the action of trover, that he "sold the debentures, and paid to the plaintiff in satisfaction. "But it may be a doubt if this recovery can be pleaded before "execution." It will be observed that Holt C.J. does not say that the commencement of an action in one form bars the

(1) 1 Taunt. 114.
(2) 3 M. & S. 191.
(3) 2 Ld. Raym. 1216, 1217.

possibility of recovery under another form of action; even against the same party, the bar only arises in his view, at earliest, on recovering judgment.

The Court of Appeal largely relied upon a passage in the judgment of Bovill C.J. in *Smith* v. *Baker* (1), though they noted that the correctness of this passage had been doubted. I will deal with the judgments in *Smith* v. *Baker* (1) in a moment, but I must first examine the earlier cases referred to in the Court of Appeal's judgment which, in their view, gave no support to the doubt thus expressed. I cannot agree that they are irrelevant. *Hitchin* v. *Campbell* (2), which was treated as having no bearing on the point now in issue, appears to me, on the contrary, to indicate clearly the distinction which it is all important to bear in mind. De Grey C.J. (3), in delivering the judgment of the Court, discusses the two questions whether the plaintiff by proceeding upon the tort bars himself from proceeding upon assumpsit, or whether, in order to create a bar, the first proceeding must not go as far as judgment, and he reaches the conclusion that one personal action not going to a judgment is no bar to another being brought, but that if judgment is had on the merits, then it bars all other personal suits from the same cause of action. The Court of Appeal also were of opinion that *Morris* v. *Robinson* (4) threw no light on the problem before them. For reasons which I will state hereafter, it appears to me to be, perhaps, of all the decisions in the books, the one which is most nearly analogous to the present case. There remains, among the older authorities referred to by the Court of Appeal, the decision in *Valpy* v. *Sanders* (5), which is not directly relevant, but which clearly implies that an unsatisfied claim for payment on the basis that the defendant had bought goods from a bankrupt does not bar the assignees of the bankrupt from maintaining a subsequent action of trover.

The Court of Appeal in their judgment also referred to a passage in Bullen and Leake, 3rd ed., 1868, at p. 48. "Where "the plaintiff is entitled to waive the wrongful character of the "transaction, in order to claim his money for the proceeds "of his goods which have been wrongfully obtained, by so "doing he precludes himself from claiming any damages for "the wrong done." But this throws no light on what constitutes waiver and falls far short of implying that the mere institution of an action is waiver. Indeed, the cases cited at the end of this passage relate to other facts alleged to constitute a waiver, e.g., in *Brewer* v. *Sparrow* (1) the plaintiffs had without litigation accepted payment from the defendant on the basis that he was their agent to sell the goods, and having thus received satisfaction for the wrongful act, could not afterwards treat the defendant as a wrongdoer and maintain trover.

---

(1) L. R. 8 C. P. 350, 355.
(2) (1772) 2 Wm. Bl. 827.
(3) Ibid. 830.
(4) 3 B. & C. 196.
(5) (1848) 5 C. B. 886.

This brings me to *Smith* v. *Baker*. (2) Bovill C.J. says (3): "The law is clear that a person who is entitled to complain "of a conversion of his property, but who prefers to waive "the tort, may do so and bring his action for money had "and received for the proceeds of goods wrongfully sold. "The law implies, under such circumstances, a promise on "the part of the tortfeasor that he will pay over the proceeds "of the sale to the rightful owner. But if an action for "money had and received is so brought, that is in point of "law a conclusive election to waive the tort; and so the "commencement of an action of trespass or trover is a "conclusive election the other way. The principles which "govern the subject are very well illustrated in the case of "*Buckland* v. *Johnson* (4), where it is held that the plaintiff "having sued one of two joint tortfeasors in tort could not "afterwards sue the other for money had and received." Undoubtedly, my Lords, Bovill C.J. in this passage suggests that it is the bringing of the action which constitutes a conclusive election. But this is an isolated dictum, not at all necessary for the case with which Bovill C.J. was dealing. The dictum was not affirmed by the Chief Justice's colleagues,

(1) (1827) 7 B. & C. 310.

(2) L. R. 8 C. P. 350.

(3) L. R. 8 C. P. 355.

(4) (1854) 15 C. B. 145.

for Keating J., after first stating that counsel had admitted that if the plaintiff had brought an action for money had and received, that would amount to a conclusive election to waive the tort, restates the admission, a few lines lower down, as being that the "recovering of the proceeds by an action "for money had and received" would be a conclusive election. It is the second proposition, and not the first, which is correct. The third judge, Honyman J., treats the election as conclusive where the plaintiff has obtained some advantage, and this again vetoes the idea that the mere issue of a writ constitutes election. The actual question in *Smith* v. *Baker* (1) arose out of a claim for money had and received which did not go to judgment, but under the order of the Court of Bankruptcy the proceeds of the sale had been paid over to the plaintiffs who, it was held, could not then bring an action. In Keating J.'s words, what happened was substantially equivalent to recovering in an action for money had and received.

Moreover, the case of *Buckland* v. *Johnson* (2), which Bovill C.J. cited, is no authority for the proposition which it was vouched to illustrate. That was not a case where the plaintiff was barred from pursuing a second action for money had and received because he had already sued in tort. The plaintiff had not merely sued, he had recovered in the first action and it was the fact that he had recovered which constituted a bar. All the judgments in *Buckland* v. *Johnson* (2) confirm this view. For instance, Jervis C.J. says (3) that the question which was substantially at issue between the parties was "whether there had been a substantial recovery by the "plaintiff in the former action, so as to bar his right to "recover in this." Maule J. (4) says that the substantial answer to the second action is that there had been an action for the conversion and recovery under it. He goes on (5): "Having his election to sue in trover for the value of the "goods at the time of the sale, or for the proceeds of the "sale as money had and received, the plaintiff elected the

---

(1) L. R. 8 C. P. 350.
(2) 15 C. B. 145.
(3) Ibid. 160, 161.
(4) 15 C. B. 165.
(5) Ibid. 166.

H. L. (E.)
1940
UNITED AUSTRALIA, LD.
v.
BARCLAYS BANK, LD.
Viscount Simon L.C.

"former remedy, and he has obtained a verdict and judgment. "He has, therefore, got what the law considers equivalent "to payment, namely, a judgment for the full value of the "goods. . . . . Having once recovered a judgment, his "remedy was altogether gone." Crowder J. says (1): "The "plaintiff, having made his election to sue for the tort, and "having recovered what the jury considered the value of "the goods at the time of the conversion, cannot now bring "money had and received in respect of the same cause of "action."

My Lords, it is remarkable that the passage above cited from Bovill C.J. in *Smith* v. *Baker* (2), together with his reference to *Buckland* v. *Johnson* (3), should have been quoted and relied upon in some subsequent judgments, as well as in some text-books, without due note being taken of the fact that Bovill C.J.'s proposition was a mere obiter dictum, that the other judges in that case did not agree with him on the point, that the decision of *Buckland* v. *Johnson* (3) did not support the proposition at all, and that as long ago as the time of Sir John Holt the true proposition had been laid down that it is judgment in the first action, and not merely the bringing of the claim, which constitutes a bar of the second action. The contradiction between these two views becomes yet more striking when one examines the judgments of the Court of Appeal in *Rice* v. *Reed*. (4) The members of the Court reached a unanimous conclusion on a view of the facts and yet A. L. Smith L.J. (5) expresses his agreement with Bovill C.J.'s proposition, while that very accurate common lawyer, Vaughan Williams L.J. (6) lays down the true rule that where there has been no judgment the plaintiff has not lost his alternative remedy.

This review of the authorities convinces me that the oft-quoted dictum of Bovill C.J. in *Smith* v. *Baker* (2) is wrong. There is, as far as I can discover, no reported case which has ever laid it down as matter of decision that when the plaintiff

(1) 15 C. B. 168.
(2) L. R. 8 C. P. 350, 355.
(3) 15 C. B. 145.
(4) [1900] 1 Q. B. 54.
(5) Ibid. 66.
(6) Ibid. 67.

H. L. (E.)
1940
United Australia, Ld.
v.
Barclays Bank, Ld.

Viscount Simon L.C.

"waives the tort" and starts an action in assumpsit, he then and there debars himself from a future proceeding based on the tort. It would be very remarkable if it were so. "The fallacy of the argument," as Lord Ellenborough said in *Hunter* v. *Prinsep* (1), "appears to us to consist in "attributing more effect to the mere form of this action than "really belongs to it. In bringing an action for money had "and received, instead of trover, the plaintiff does no more "than waive any complaint, with a view to damages, of the "tortious act by which the goods were converted into money, "and takes to the neat proceeds of the sale as the value of "the goods." When the plaintiff "waived the tort" and brought assumpsit, he did not thereby elect to be treated from that time forward on the basis that no tort had been committed; indeed, if it were to be understood that no tort had been committed, how could an action in assumpsit lie? It lies only because the acquisition of the defendant is wrongful and there is thus an obligation to make restitution.

The true proposition is well formulated in the Restatement of the Law of Restitution promulgated by the American Law Institute, p. 525, as follows: "A person upon whom a tort "has been committed and who brings an action for the "benefits received by the tortfeasor is sometimes said to "'waive the tort.' The election to bring an action of "assumpsit is not, however, a waiver of tort but is the choice "of one of two alternative remedies." Contrast with this, instances of true waiver of rights, e.g., waiver of forfeiture by receiving rent.

If, under the old forms of procedure, the mere bringing of an action while waiving the tort did not constitute a bar to a further action based on the tort, still less could such a result be held to follow after the Common Law Procedure Act, 1852, and the Judicature Act, 1875. For it is now possible to combine in a single writ a claim based on tort with a claim based on assumpsit, and it follows inevitably that the making of the one claim cannot amount to an election which bars the making of the other. No doubt, if the plaintiff proved the necessary facts, he could be required to elect on which of his alternative causes of action he would take judgment, but that has nothing to do with the unfounded contention that election arises when the writ is issued. There is nothing conclusive about the form in which the writ is issued, or about the claims made in the statement of claim. A plaintiff may at any time before judgment be permitted to amend. The substance of the matter is that on certain facts he is claiming redress either in the form of compensation, i.e., damages as for a tort, or in the form of restitution of money to which he is entitled, but which the defendant has wrongfully received. The same set of facts entitles the plaintiff to claim either form of redress. At some stage of the proceedings the plaintiff must elect which remedy he will have. There is, however, no reason of principle or convenience why that stage should be deemed to be reached until the plaintiff applies for judgment.

---

(1) 10 East, 378, 391.

So far, I have been discussing what is the true proposition of law when the second action is brought against the same defendant. In the present case, however, the action which is said to be barred by former proceedings against M. F. G. is not an action against M. F. G. at all, but an action against Barclays Bank. I am quite unable to see why this second action should be barred by the plaintiff's earlier proceedings against M. F. G. In the first place, the tort of conversion of which the bank was guilty is quite a separate tort from that done by M. F. G. M. F. G.'s tort consisted in taking the cheque away from the appellants without the appellants' authority; that tort would have equally existed if M. F. G., instead of getting the cheque cleared through the bank, had kept it in its own possession. The bank's tort, on the other hand, consisted in taking a cheque, which was the property of the appellants, and without their authority using it to collect money which rightly belonged to the appellants. M. F. G. and the bank were not joint tortfeasors, for two persons are not joint tortfeasors because their independent acts cause the same damage.

But, apart from this, what ground is there for saying that proceedings in which M. F. G. were sued on the basis of waiving the tort, but which never resulted in satisfaction, should be regarded as a bar to suing the Bank for conversion? A case which comes near to the present is *Morris* v. *Robinson*. (1) There, cargo belonging to the plaintiffs had been improperly sold during the course of a voyage. There were thus two lines of remedy which the plaintiffs could pursue. They first brought an action against the shipowners for breach of their duty as carriers, with a count in trover. They recovered a verdict; but they did not enter up judgment and there had been no actual satisfaction of their claim. Instead, they brought another action against different defendants—namely, an action for conversion against the purchasers who had bought the cargo. It was held by the Court of King's Bench that the former action was no bar, and that the defendants in the second action were liable for their act in purchasing the plaintiff's goods. Bayley J., in giving judgment, observed (1): "If concurrent actions had been brought, that against the "owners could not have barred the other; why then should "it have that effect because they have been brought at different "times? If indeed the plaintiffs were to recover the full value "of the goods in each action, a court of equity would interfere "to prevent them from having a double satisfaction, but there "is nothing in the former action which can, in a court of law, "prevent the recovery in this." Similar reasoning, as it seems to me, would apply in the present case, and it follows that the earlier proceedings against M. F. G. could provide the present respondents with no defence, unless as a result of them the plaintiffs had received satisfaction for their loss.

This conclusion makes it unnecessary to consider and decide upon a further argument which was strongly urged on behalf of the appellants, namely, that the appellants, when instituting proceedings against M. F. G., could not be regarded as finally electing, since at that time the plaintiff company knew nothing of the existence of the cheque or of its treatment by the respondent bank, and election involves the knowledge of all material facts. Neither is it necessary to deal with a further suggestion made during the argument that, inasmuch as a company would not be acting intra vires if it authorized its secretary to pay away its money to a third party without getting anything in return, the appellants could not ratify the act of Emons when he professed to be acting on the appellants' behalf in doing so.

---

(1) 3 B. & C. 196, 205.

As for the more recent decision of *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co., Ld.* (1), upon which much reliance was placed in the Court below, it is sufficient to say that it can be distinguished from the present case on the ground that there the earlier of the two actions ended in the plaintiffs recovering judgment, whereas in the present case the appellants got no judgment against M. F. G. at all.

To avoid misunderstanding, I must add that I do not think that the respondents in the present case would escape liability, even if judgment had been entered in the appellant company's earlier action against M. F. G. What would be necessary to constitute a bar, as Bayley J. pointed out in *Morris* v. *Robinson* (2), would be that, as the result of such judgment or otherwise, the appellants should have received satisfaction.

My Lords, I am glad that it is possible to reach this result, for the alternative view, which is based upon a misreading of technical rules, now happily swept away, would have worked substantial injustice. The appellants have lost their money, and they have lost it owing to the tort of the respondent bank. Why should they not recover it in this action? Nothing that has previously happened in the proceedings against M. F. G., no earlier step taken by the appellants, have prejudiced the position of the bank in any way. All that the respondents have been deprived of is the fleeting prospect of avoiding responsibility if the appellants had succeeded in obtaining satisfaction from another party. The "general principles of right," to which the Court of Appeal referred in its judgment, would surely indicate that the respondent bank should not escape because the appellants

(1) [1921] 2 K. B. 608.

(2) 3 B. & C. 196, 205.

H. L. (E.)
1940
UNITED AUSTRALIA, LD.
v.
BARCLAYS BANK, LD.
Viscount Simon L.C.

have wasted time and money in pursuing another remedy which turned out to be illusory.

Lord Campbell, in his Life of Lord Ellenborough (ch. 46) permits himself the reflection that "in the exquisite logic "of special pleading rightly understood, there is much to "gratify an acute and vigorous understanding." Lord Campbell himself was one of three future Lord Chancellors who were pupils of Mr. William Tidd, and might be expected loyally to subscribe to the ecstatic comment "Oh, what a "writer Mr. Tidd is, Master Copperfield!" But while admiring the subtlety of the old special pleaders, our Courts are primarily concerned to see that rules of law and procedure should serve to secure justice between the parties.

I move that this appeal be allowed with costs here and below, and that judgment be entered for the appellants for 1900*l.* with interest at four per cent. per annum as from November 12, 1934.

LORD ATKIN (read by Lord Thankerton). My Lords, the only question in this case is whether the plaintiffs have precluded themselves from recovering damages from the defendant bank for what is now admitted to be a conversion by the bank of a cheque for 1900*l.*, the property of the plaintiffs. It is said that by certain proceedings which they took against the customers for whom the bank collected the cheque, the plaintiffs have waived the tort, and lost the right of suing for damages. The facts relate to three companies, United Australia, Ld., the plaintiffs, who were the payees of the cheque, Lower Ancobra (Gold Coast) Areas, Ld., the drawers of the cheque, and M. F. G. Trust, Ld., for whom the bank collected the cheque and into whose account with them they paid the proceeds. It appears that the plaintiff company sought to do business in mining concessions. The principal shareholder was a Mr. Grimwade, who in 1934 had become acquainted with Mr. James Gould, an experienced financier who had the misfortune to be an undischarged bankrupt. M. F. G. Trust, Ld., was a company which received the benefit of some of Mr. Gould's financial operations. The initials are the initials of Mr. Gould's wife, a lady of fortune, and the name is a guide to the nature of the company. It had the advantage of having Mr. Gould as its accountant. Lower Ancobra (Gold Coast) Areas, Ld., was another company which was interested in gold mining concessions. Mr. Gould was closely associated also with it: but in his position could not of course be a director. In April, 1934, Mr. Grimwade was proceeding to West Africa for the purpose of obtaining mining concessions. On Mr. Gould's suggestion Mr. Grimwade arranged to have Mr. Emons, a clerk of Mr. Gould's, appointed a director of the company and also secretary. Mr. Emons was given authority to endorse cheques for collection by the company's bank, but not otherwise. Mr. Grimwade, before leaving, gave a joint and several power of attorney to Mr. Gould and Mr. Davies, a solicitor, in pursuance of which Mr. Gould appears substantially to have managed the affairs of the company in Mr. Grimwade's absence. There was another director, Mr. Kent Jones, who attended meetings, but appears to have been given little information as to the company's affairs. It would appear that by agreements made in June and August, 1934, the plaintiff company agreed to sell certain concessions which had been obtained by Mr. Grimwade to the Lower Ancobra Company for 5000*l.* in cash and a certain number of shares. The 5000*l.* in cash was paid by the Lower Ancobra Company by three cheques drawn in favour of the plaintiff company, June 29, 1934, 1200*l.*; October 24, 1934, 1900*l.*; November 12, 1934, 1900*l.* The first two cheques were paid into the company's account and no question arises on them. The third cheque, which is the one in question, was endorsed as follows: "Pay to the order of the M. F. G. "Trust, Ld., for and on behalf of United Australia, Ld., A. H. "Emons, Secretary." How it reached M. F. G. Trust, Ld., is not disclosed, but it was endorsed "for and on behalf of "M. F. G. Trust, Ld., J. C. Gould, Accountant," and was paid into the defendant bank by someone not identified in evidence on a paying-in slip dated November 12. The teller not unnaturally referred the matter to the manager, endorsing the paying-in slip to that effect. In these days every bank clerk sees the red light when a company's cheque is endorsed by a company's official into an account which is not the company's. The manager, however, made no inquiries: the cheque was collected and the proceeds placed to the customer's account. Though the bank pleaded the provisions of the Bills of Exchange Act, which by s. 82 protects them if they receive payment of a crossed cheque for a customer in good faith and without negligence, they called no evidence, and that section passes out of the case.

In these circumstances it is clear and as I have said it was not disputed that the bank converted the cheque: and prima facie they would be liable in damages for the value of the cheque. It may be as well to remember that in the course of dealing with the cheque there were three separate conversions by three different persons: (1.) by Emons; (2.) by the Bank; (3.) by M. F. G. Trust, Ld.; each of whom could be sued separately for damages for separate torts.

These events, however, happened when Mr. Grimwade was away. He did not return until February, 1935, when he found that the books of account of the company were not at his office, but according to Mr. Emons were in the possession of either Mr. Gould or the auditors. When the books were returned the journal contained an entry recording the receipt of 1900*l.* on November 12, and recording on the same date a loan of the same sum to M. F. G. Trust, Ld. There was no minute in the minute book recording any such loan. Eventually, on May 13, 1935, a specially endorsed writ was issued against M. F. G. Trust, Ld., claiming 1900*l.* as money lent or, alternatively, money had and received. Judgment was signed in default of appearance, but was set aside, on an explanation of the default and on an affidavit by Emons on behalf of M. F. G. Trust, Ld., that the plaintiff company had not lent 1900*l.* to the M. F. G. Trust, Ltd., and that the money had not been received by them to the use of the plaintiffs. In June the defendants in the action delivered a defence repeating these statements. In October a compulsory winding-up order was made against M. F. G. Trust, Ld., on a creditor's petition, and the action became automatically stayed. On December 10, the plaintiff company filed an affidavit of proof of debt for money lent or money had and received, the amount endorsed being for money lent. The proof was never admitted and nothing further was done upon it in the winding-up.

It was not until June, 1935, that the plaintiffs' solicitor discovered the existence of the cheque for 1900*l.*, and still later that he discovered the circumstances in which the cheque had been collected by the bank. On November 8, 1937, the plaintiffs commenced the present action against the bank claiming damages for conversion or, alternatively, for negligence or, alternatively, for money had and received: and on December 7, they delivered a statement of claim supporting the three alternative claims.

The defendants' defence, delivered on January 10, relied on the provisions of the Bills of Exchange Act. But on April 11, 1938, the defence was amended to include a plea which I read as a plea alleging a ratification of the act of Emons purporting to act as the plaintiffs' agent by electing to adopt the payment to M. F. G. Trust as a loan. It is quite clear that there never was even a pretended loan: M. F. G. Trust, Ld., had repudiated the allegation of loan both in their affidavit and in their defence: and Mr. Emons had never purported to take part in making any loan. But though this plea proved to be completely without foundation, for some reason which was not explained it was treated by the judge and the parties alike as amounting to a plea that by suing and proving for the amount as money lent or money had and received the plaintiffs had elected to waive the tort. It is on that footing that the case was argued in the Courts below and in this House: but while the trial judge appears to have decided the case upon the ground that by suing M. F. G. Trust for money lent the plaintiffs freed the bank, the Court of Appeal appear rather to rely upon the claim for money had and received.

My Lords, we are thus compelled to consider the law relating to waiver of tort: and two questions arise: (1.) Did the plaintiffs waive the conversion by M. F. G. Trust, Ld., by suing them and proving in their liquidation for money lent or money had and received? (2.) If they did waive conversion

H. L. (E.)
1940
UNITED AUSTRALIA, LD.
v.
BARCLAYS BANK, LD.
Lord Atkin.

by the M. F. G. Trust, Ld., was that a waiver by them of the conversion by the defendant bank ?

I do not propose to discuss at any length the history of the claim in indebitatus assumpsit, and the cases through which that history has been traced. Very much learning has been devoted to this subject, and lawyers are indebted to Professor Ames, Sir William Holdsworth, and Professor Winfield for the light they have thrown upon the subject in well known works: and I should not like to omit the work of Mr. R. M. Jackson on " The History of Quasi-Contract in English Law," published in 1936 in the Cambridge Studies in English Legal History, from which I have derived assistance. There is also what I hope I may respectfully call a valuable contribution to the discussion in the articles recently published by my noble and learned friend Lord Wright on *Sinclair* v. *Brougham* (1), and a review of the American Restatement of the Law of Restitution at pp. 1 to 65 of Legal Essays and Addresses published in 1939. I have myself consulted most of the cases referred to in these works with the exception of the cases from the Year Books which I have accepted from the authors.

√ The story starts with the action of debt which was not necessarily based upon the existence of a contract, for it covered claims to recover sums due for customary dues, penalties for breaches of by-laws, and the like. The action of debt had its drawbacks, the chief being that the defendant could wage his law. There followed the application of the action on the case of assumpsit to debt. " The defendant being indebted then promised." At first there must be an express promise; then the Courts implied a promise from an executory contract: *Slade's* case. (2) *Slade's* case (2) was not a claim in indebitatus assumpsit, but the principle was applied, and it became unnecessary to prove an express promise in those cases. Then the action was allowed in respect of cases where there was no contract, executory or otherwise, as in the cases where debt would have lain for customary fees and the like; and by a final and somewhat forced application to cases where the defendant had received money of the plaintiff to which he was not entitled. These included cases where the plaintiff had intentionally paid money to the defendant, e.g., claims for money paid on a consideration that wholly failed and money paid under a mistake: cases where the plaintiff had been deceived into paying money, cases where money had been extorted from the plaintiff by threats or duress of goods. They also included cases where money had not been paid by the plaintiff at all but had been received from third persons, as where the defendant had received fees under colour of holding an office which in fact was held by the plaintiff: and finally cases like the present where the defendant had been wrongfully in possession of the plaintiff's goods, had sold them and was in possession of the proceeds. Now to find a basis for the actions in any actual contract whether express or to be implied from the conduct of the parties was in many of the instances given obviously impossible. The cheat or the blackmailer does not promise to repay to the person he has wronged the money which he has unlawfully taken: nor does the thief promise to repay the owner of the goods stolen the money which he has gained from selling the goods. Nevertheless, if a man so wronged was to recover the money in the hands of the wrongdoer, and it was obviously just that he should be able to do so, it was necessary to create a fictitious contract: for there was no action possible other than debt or assumpsit on the one side and action for damages for tort on the other. The action of indebitatus assumpsit for money had and received to the use of the plaintiff in the cases I have enumerated was therefore supported by the imputation by the Court to the defendant of a promise to repay. The fiction was so obvious that in some cases the judge created a fanciful relation between the plaintiff and the defendant. Thus in cases where the defendant had wrongly sold the plaintiff's goods and received the proceeds it was suggested in some cases, not in all, that the plaintiff chose to treat the wrongdoer as having sold the goods as his agent and so being under an implied contract to his principal to repay. Even here in the relatively more recent cases where this explanation is given by Grose J. in *King* v. *Leith* (1) and *Marsh* v. *Keating* (2) by Park J. in delivering the opinion of the judges in the House of Lords the wrongdoer had in fact in both cases purported to sell the goods as the agent of his principal. But the fiction is too transparent. The alleged contract by the blackmailer and the robber never was made and never could be made. The law, in order to do justice, imputed to the wrongdoer a promise which alone as forms of action then existed could give the injured person a reasonable remedy. But while it was just that the plaintiff in such cases should be able to recover the money in the possession of the other party, he was not bound to exercise this remedy: in cases where the money had been received as the result of a wrong he still had the remedy of claiming damages for tort in action for trespass, deceit, trover, and the like. But he obviously could not compel the wrongdoer to recoup him his losses twice over. Hence he was restricted to one of the two remedies: and herein as I think arose the doctrine of "waiver of the tort." Having recovered in contract it is plain that the plaintiff cannot go on to recover in tort. Transit in rem judicatam. The doctrine has thus alternatively been said to be based on election: i.e., election between two remedies and the stage at which this election takes place was the subject of discussion in the argument in the present case. I will treat of election later. But at present I wish to deal with the waiver of the tort which is said to arise whenever the injured person sues in contract for money received. If the plaintiff in truth treats the wrongdoer as having acted as his agent, overlooks the wrong, and by consent of both parties is content to receive the proceeds this will be a true waiver. It will arise necessarily where the plaintiff ratifies in the true sense an unauthorized act of an agent: in that case the lack of authority disappears, and the correct view is not that the tort is waived, but by retroaction of the ratification has never existed. But in the ordinary case the plaintiff has never the slightest intention of waiving, excusing or in any kind of way palliating the

---

(1) [1914] A. C. 398.

(2) (1602) 4 Coke, 92 (*b*).

(1) (1787) 2 Term. Rep. 141, 145. (2) (1834) 1 Bing. N. C. 198, 215.

tort. If I find that a thief has stolen my securities and is in possession of the proceeds, when I sue him for them I am not excusing him. I am protesting violently that he is a thief and because of his theft I am suing him: indeed he may be in prison upon my prosecution. Similarly with the blackmailer: in such a case I do not understand what can be said to be waived. The man has my money which I have not delivered to him with any real intention of passing to him the property. I sue him because he has the actual property taken: and I suggest that it can make no difference if he extorted a chattel which he afterwards sold. I protest that a man cannot waive a wrong unless he either has a real intention to waive it, or can fairly have imputed to him such an intention, and in the cases which we have been considering there can be no such intention either actual or imputed. These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them undeterred.

Concurrently with the decisions as to waiver of tort there is to be found a supposed application of election: and the allegation is sometimes to be found that the plaintiff elected to waive the tort. It seems to me that in this respect it is essential to bear in mind the distinction between choosing one of two alternative remedies, and choosing one of two inconsistent rights. As far as remedies were concerned, from the oldest time the only restriction was on the choice between real and personal actions. If you chose the one you could not claim on the other. Real actions have long disappeared: and, subject to the difficulty of including two causes of action in one writ which has also now disappeared, there has not been and there certainly is not now any compulsion to choose between alternative remedies. You may put them in the same writ: or you may put one in first, and then amend and add or substitute another. I will cite one authority which has to deal with the question whether a claim for injury to a passenger was founded on contract or tort for the purposes of the County Courts Act. "At the present time a plaintiff may frame his "claim in either way, but he is not bound by the pleadings, and "if he puts his claim on one ground and proves it on another "he is not now embarrassed by any rules as to departure" per Lord Esher in *Kelly* v. *Metropolitan Ry. Co.* (1)

On the other hand, if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose. Instances are the right of a principal dealing with an agent for an undisclosed principal to choose the liability of the agent or the principal: the right of a landlord where forfeiture of a lease has been committed to exact the forfeiture or to treat the former tenant as still tenant and the like. To those cases the statement of Lord Blackburn in *Scarf* v. *Jardine* (2) applies "where a man has an option to choose one or other of "two inconsistent things when once he has made his election "it cannot be retracted." In a later passage (3) Lord Blackburn speaks of a man choosing between two remedies: but it is plain that he is speaking of remedies in respect of the inconsistent things as stated above. The case was one where the plaintiff had a right of recourse against two former partners, or against two new partners: but obviously not against both. Lord Blackburn quotes *Dumpor's* case (4) which was a plain case of inconsistent rights, the question of waiver of a forfeiture. I therefore think that on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other: but he can take judgment only for the one, and his cause of action on both will then be merged in the one. This seems to me to be the decision of both Lord Russell of Killowen C.J. and of Vaughan Williams L.J. in *Rice* v.

---

(1) [1895] 1 Q. B. 944, 946.

(2) (1882) 7 App. Cas. 345, 360.

(3) (1882) 7 App. Cas. 345, 361.

(4) (1601) 4 Co. Rep. 119 (*b*).

Reed (1): and I cannot agree with the dictum of A. L. Smith L.J. (2) that to bring an action for money had and received waives the tort. He founded himself upon words used by Bovill C.J. in *Smith* v. *Baker*. (3) The dictum was unnecessary, for in that case the plaintiff had obtained an order from the Court of Bankruptcy to hand over the proceeds of a conversion and had been paid the money. The dictum of Bovill C.J. is in my opinion incorrect.

In the present case, therefore, I find that the plaintiffs were at no stage in the proceedings they took against M. F. G. Trust called to make an election, and, if it were necessary so to hold, in fact made no election, to claim in contract and not to claim in tort: and the foundation of the defendant's defence disappears. But I think it necessary to add that even if the tort had been waived, or the plaintiff had made any final election against M. F. G. Trust, Ld., I fail to see why that should have any effect upon their claims against the bank. If a thief steals the plaintiff's goods worth 500*l.* and sells them to a receiver for 50*l.* who sells them to a fourth party for 400*l.*, if I find the thief and he hands over to me the 50*l.* or I sue him for it and recover judgment I can no longer sue him for damages for the value of the goods, but why should that preclude me from suing the two receivers for damages. I shall not be misunderstood as imputing dishonesty in this case but the instance illustrates the point. I can see no justice in the contention: and I know of no authority in support of it. The case of *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co., Ld.* (4), upon which both the Courts below founded their decision has with great respect very little bearing on the matter. A firm of carriers being authorized by the plaintiffs to carry goods to A delivered them to B. The plaintiffs invoiced the goods to B, sued him for the price, recovered judgment and took bankruptcy proceedings against him. They afterwards sued the carriers for misdelivery. It was the plainest case of ratification of an act done by the carriers purporting to deliver on behalf of the plaintiffs; and as such there could be no complaint against the carriers for breach of authority. There are statements made in some of the judgments on "approbating and reprobating": but these words have had their proper meaning attributed to them in the judgment of my noble and learned friend Viscount Maugham in *Lissenden* v. *C. A. V. Bosch, Ld.* (1), and will probably now become unfashionable.

---

(1) [1900] 1 Q. B. 54.

(2) Ibid. 65, 66.

(3) L. R. 8 C. P. 350, 355.

(4) [1921] 2 K. B. 608.

I think that authority for the opposite view is to be found both in *Rice* v. *Reed* (2) and in *Hunter* v. *Prinsep.* (3) In that case the charterer had loaded a cargo of wood at Honduras for London, freight to be paid on delivery in London. The ship had an adventurous voyage, for, having been captured and recaptured, she was wrecked at St. Kitts. There the captain without authority obtained an order from the Vice-Admiralty Court for sale of the cargo: and the proceeds of sale were remitted to the shipowners. On being sued by the charterers for money had and received they set up a cross claim for freight pro rata itineris. It was contended by the shipowners that by suing for money had and received the plaintiffs had adopted and confirmed the act of the master and had acquiesced therefore in preventing further conveyance and the earning of the full freight. But Lord Ellenborough held that "the fallacy of the argument on the part of the defendants "appears to us to consist in attributing more effect to the "mere form of this action than really belongs to it. In "bringing an action for money had and received, instead of "trover, the plaintiff does no more than waive any complaint, "with a view to damages of the tortious act by which the "goods were converted into money; and takes to the neat "proceeds of the sale as the value of the goods." He decided therefore, that the shipowners were not excused for their failure to deliver the goods and were not entitled to the freight claimed. This decision which applies to the case of the party from whom money had and received was claimed and whose tort was on the hypothesis waived, seems capable of application a fortiori to an independent wrongdoer.

(1) [1940] A. C. 412, 417.
(2) [1900] 1 Q. B. 54.
(3) 10 East 378.

I think, therefore, that the defence of the bank fails on all grounds. I notice, however, that the judgment of the Court of Appeal gives to the members the comforting reflection that they have arrived at a decision which is not only right in law but is just in fact. I see no kind of injustice in the present result which enables the plaintiffs to recover a sum of money which, but for the want of ordinary care on the part of the bank officials, they would probably never have lost. I think that the appeal should be allowed, the judgment of Goddard J. set aside and judgment entered for the plaintiffs with costs here and below for 1900*l.* together with such interest, if any, that the House shall decide to give them.

LORD THANKERTON. My Lords, I have had the privilege of reading and considering the opinions which have just been delivered, and I express my concurrence in them.

LORD ROMER. My Lords, I, too, have had the privilege of reading beforehand the opinions that you have just heard of my noble and learned friends the Lord Chancellor and Lord Atkin. These opinions express so fully my own views regarding the questions to be decided on this appeal that I shall not, I trust, be thought guilty of any discourtesy to the learned judges in the Courts below if I content myself with adding only a very few words of my own.

My Lords, if Emons had made a loan to M. F. G. Trust, Ld., of the 1900*l.* now in question purporting to act as the agent of the plaintiffs in the transaction, although having no authority in fact, the plaintiffs (assuming that they had power to make loans without security) could without question have ratified Emons's act. Speaking for myself I think that they would in those circumstances have ratified it if, with full knowledge of the material facts, they had unequivocally sued the M. F. G. Trust for the 1900*l.* as money lent. It would have been the ordinary case of a principal ratifying an act of his agent performed in excess of his authority. But Emons never purported to make a loan of the money to M. F. G.

Trust, Ld., as the agent of the plaintiffs, or for the matter of that to make a loan of the money at all; nor, when the plaintiffs sued M. F. G. Trust, Ld., and subsequently lodged a proof for the money in the liquidation of that company, do they appear to have known the real facts relating to the dealing by Emons with the cheque for 1900*l.*; and, finally, they did not either in the action or in the proof claim the money as a loan unequivocally. In both cases they added an alternative claim to the 1900*l.* as money had and received to their use. In these circumstances the fact that the plaintiffs included in their writ against the M. F. G. Trust and in their subsequent proof in the liquidation of that company a claim to the 1900*l.* as money lent has no bearing whatsoever upon the only question to be determined upon this appeal, which is the question whether, by including in the writ and the proof a claim to that sum as money had and received to their use, the plaintiffs have precluded themselves from now claiming against the bank damages for the wrongful conversion of the cheque.

A person whose goods have been wrongfully converted by another has the choice of two remedies against the wrongdoer. He may sue for the proceeds of the conversion as money had and received to his use, or he may sue for the damages that he has sustained by the conversion. If he obtains judgment for the proceeds, it is certain that he is precluded from thereafter claiming damages for the conversion. But, in my opinion, this is not due to his having waived the tort but to his having finally elected to pursue one of his two alternative remedies. The phrase " waive the tort " is a picturesque one. It has a pleasing sound. Perhaps it was for these reasons that it was regarded with so much affection by the old Common Lawyers, one of whom, indeed, was moved to break into verse upon the subject. But with all respect to their memories, I firmly believe that the phrase was an inaccurate one if and so far as it meant that the tortious act was affirmed. What was waived by the judgment was not the tort, but the right to recover damages for the tort. As was said by Lord Ellenborough in the case of *Hunter* v. *Prinsep* (1) " in bringing an

---

(1) 10 East 378, 391.

"action for money had and received, instead of trover, the "plaintiff does no more than waive any complaint, with a "view to damages, of the tortious act by which the goods were "converted into money, and takes to the neat proceeds of the "sale as the value of the goods." The plaintiff in no way affirms the tortious act so as to treat it as having been a rightful one. As has been pointed out by the Lord Chancellor the action of assumpsit would not lie if it were to be understood that no tort had been committed. Before the Common Law Procedure Act, 1852, the plaintiff in his declaration would have averred a promise to pay the proceeds of the conversion, and a breach of such promise. The promise could not, of course, be proved, because there was no such promise in fact. The promise would have been inferred from the evidence showing that a tortious act had been committed. My Lords, I concur in the motion before the House.

LORD PORTER (read by LORD ROMER). My Lords, in this case United Australia, Ld., appeal from an order of the Court of Appeal affirming a judgment of Goddard J. in favour of the respondents. The substantial claim in that action was by the appellants against the respondents (1.) for damages for wrongful conversion of a cheque for 1900*l.* dated November 12, 1934, the property of the appellants, and (2.) alternatively for the sum of 1900*l.* as money had and received by the respondents to the use of the appellants. The history of the matter is shortly as follows.

At the beginning of 1934 a Mr. Grimwade held, either in his own name or in the name of nominees, all the shares of the appellant company. The company had then no money and no banking account, but about that time Mr. Grimwade met a Mr. Gould, an undischarged bankrupt, and determined with his help to try to resuscitate its fortunes. For that purpose he decided to proceed to West Africa in order to endeavour to obtain or confirm for the plaintiff company certain concessions there. In order to effect his object he obtained a power of attorney from the appellants on April 25, 1934. At that time a Mr. Kent Jones, a nominee of Mr. Grimwade, was their chairman, but Mr. Grimwade seems to have thought that Mr. Gould would be a more energetic manager of the appellants' business in England, and before his departure he executed a joint and several power of attorney dated April 30, 1934, in favour of Mr. Gould and a Mr. C. E. Davies, a solicitor. He left England about May 2, 1934. Before his departure a Mr. Emons who was a clerk in Gould's employment was appointed a director and secretary of the appellant company. Mr. Gould held no official position with the appellants except that at some time he appears to have been appointed accountant, but after Mr. Grimwade's departure their affairs in England were conducted by him without objection on the part of Mr. Kent Jones. Indeed, though not a director, Mr. Gould attended all the board meetings, apparently on the strength of the power of attorney granted to him by Mr. Grimwade. On July 17, 1934, another of Mr. Gould's employees, Mr. Mangold, became a director of the appellant company.

Meanwhile certain options had been obtained giving the appellants mining rights in the Gold Coast Colony and these rights were sold to a company called Lower Ancobra (Gold Coast) Area, Ld., a public company promoted by Mr. Gould for the purpose of acquiring them. The price paid was 5000*l.* The liability of the Lower Ancobra Company was met by sending three cheques to the appellants: the first cheque dated June 30, 1934, for 1200*l.* was paid to the credit of the appellants with the National Provincial Bank, Ld., with whom they had opened an account. The second cheque for 1900*l.* was dated October 25, 1934, and was treated in the same way but the appellants drew a cheque for 1750*l.* on their account at the bank in favour of a company known as M. F. G. Trust, Ld. This company was a trust operated nominally for the benefit of Mrs. Gould whose initials were M. F. G. Of that company Mr. Emons was both director and secretary. The third cheque dated November 12, 1934, for 1900*l.* was indorsed as follows: "Pay to order of the M. F. G. Trust "Limited for and on behalf of United Australia Limited "A. H. Emons Secretary." The cheque so indorsed was paid to the account of M. F. G. Trust, Ld., with the respondent bank and the proceeds were collected by them as bankers for the M. F. G. Trust, Ld.

The respondents' cashier appears to have had some doubts as to paying a cheque drawn in favour of one company to the account of another, and it seems that they had information which should have indicated to them that Emons was interested in both companies. In these circumstances the cashier referred the cheque to the manager, but the manager made no inquiries and authorized the collection of the cheque for M. F. G. Trust, Ld. It is common ground that Emons had no authority to deal with the cheque as he did and that both M. F. G. Trust, Ld., and the bank were at that stage guilty of its conversion unless the bank were protected by s. 82 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), together with the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17).

By their defence the bank relied upon the provisions of these Acts, but as the onus was upon them to prove that they had acted in good faith and without negligence, and as they called no evidence, no reliance could be placed by them upon this plea.

Neither the receipt nor the indorsement of the cheque was reported to the appellants' board.

On February 3, 1935, Mr. Grimwade returned to this country; on February 21 Mr. Gould was dismissed from his office as accountant, and in March, 1935, it was ascertained from the bank pass book that the cheque for 1750*l.* had been drawn, but as Mr. Gould's employees refused to give up the rest of the books of the company which were in their possession nothing was known of the cheque for 1900*l.*

At an extraordinary general meeting held on April 10, 1935, Emons and Mangold were removed from their directorships and the former ceased to be secretary. It was not, however, until May 9, 1935, that the ledger was recovered and the payment of the sum of 1900*l.* to M. F. G. Trust, Ld., ascertained. The entries showed both the 1750*l.* and 1900*l.* as loans, and appear to have been made on the instructions of either Emons, Mangold or Gould, but the date at which they were made could not be ascertained.

On May 13, 1935, a writ was issued against M. F. G. Trust, Ld., for these two sums as money lent, or, alternatively, as money had and received to the use of the appellants. At that time the appellants had no knowledge of the form in which the sum of 1900*l.* had reached M. F. G. Trust, Ld., and accordingly described it as cash. On May 22, 1935, judgment was obtained by the appellants in default of appearance, but on the next day M. F. G. Trust, Ld., entered an appearance and applied to set aside the judgment. On this application Emons made an affidavit stating that none of the money was lent by the appellants to M. F. G. Trust, Ld., and also stating that on November 12, 1934, a cheque drawn in favour of the plaintiff company for 1900*l.* was endorsed over by him as secretary of the plaintiff company to the defendant company. On this application the judgment was set aside and the M. F. G. Trust, Ld., permitted to defend.

Their defence was delivered on June 22, 1935, and denied the loan and the receipt of either sum for the use of the appellants.

On October 25, 1935, a winding-up order was made against M. F. G. Trust, Ld., on the petition of other creditors with the result that the action was automatically stayed. On December 10, 1935, in the winding-up, the appellants lodged a proof of debt alleging that M. F. G. Trust, Ld., were indebted to them in the two sums as money lent or as money had and received to their use.

From these facts it appears that the appellants did not know of the existence of the cheque for 1900*l.* until they saw the affidavit of Emons dated May 25, 1935, and the exact form of the cheque or of its indorsement does not appear to have been ascertained by them until they were shown a copy of it by their solicitor in June. No evidence was given tending to show that either at that time or when they lodged their proof of debt any circumstances had been brought to their attention upon which they could found a plea that the bank had acted either negligently or not in good faith.

M. F. G. Trust, Ld., proved to be without assets and following the usual practice in such cases the Official Receiver neither admitted the debt nor even troubled to consider the alleged liability of the company towards those who had lodged proofs in the liquidation.

The appellants having for these reasons been unable to obtain any redress from M. F. G. Trust, Ld., began the present action by writ dated November 8, 1937, against the respondents claiming damages for wrongful conversion of the cheque for 1900*l.* and alternatively for money had and received by the defendants for the use of the plaintiffs. Besides pleading the Bills of Exchange Acts the respondents by para. 4 of their amended defence pleaded as follows: "4. In the further "alternative if, which is denied, the said Emons was not "authorised to indorse the said cheque as aforesaid the "defendants will contend that in so indorsing the same the "said Emons purported to act as the plaintiffs' agent and the "plaintiffs subsequently with full knowledge of all material "facts ratified his said act by electing to adopt the payment "to M. F. G. Trust as a loan from the plaintiffs by suing for "and recovering judgment for the same and by proving in "the liquidation of the said Trust for the amount thereof."

On its face this plea is an allegation of the ratification by the appellants of the act of their agent Emons with full knowledge of all the material facts. It was proved, however, that Emons was not authorized to indorse the cheque and in default of explanation or excuse the indorsement and handing over of a cheque without consideration would plainly be ultra vires the appellant company and therefore could not be ratified by them. But the substantial argument put before the Court of first instance and the Court of Appeal was not based upon ratification in the strict sense of the term but upon the allegation that by suing the M. F. G. Trust for debt or alternatively for money had and received, the appellants had waived the tort and chosen to proceed in contract and could not thereafter sue the respondents. The argument was and must, I think, be put in the following way: by suing either for money lent or for money had and received the appellants treated Emons as their agent to pay the money to M. F. G. Trust, Ld., and treated M. F. G. Trust, Ld., as having rightfully received the money on their behalf. If, then, the money was rightfully received by M. F. G. Trust, Ld., the bank could not be treated as having wrongfully collected it on their behalf, nor could they be sued for money had and received when they had dealt with it in accordance with the instructions of the plaintiffs' agent.

The learned judge of first instance and the Court of Appeal accepted the respondents' argument. The learned judge, however, appears to have founded his decision upon the ground that as the writ contained a claim for money lent the action could only be brought on the footing that whosoever handed the money to the M. F. G. Trust, Ld., was acting with authority. He seems to have been doubtful whether an action for money had and received would have barred the plaintiffs' claim. In reaching this conclusion I think he overlooked the fact that if an action is brought for money lent, or, alternatively, for money had and received, it cannot be said that the plaintiff has elected to sue for money lent ; he still leaves open his right to rely solely upon the action for money had and received and to disregard the claim for money lent, just as in a case where an action is brought for conversion or, alternatively, for money had and received, the plaintiff cannot be said, at any rate until judgment, to have elected between the two remedies : see *Rice* v. *Reed*. (1)

The Court of Appeal appear to have recognized this difficulty and therefore to have based their decision upon the proposition that the appellants by suing for money had and received, had finally elected to waive the tort, and thereafter could not sue either M. F. G. Trust, Ld., or any other converter of the cheque for the conversion.

The decision rests, I think, upon a purely technical ground and goes back to the principles established at a time when a plaintiff's right to succeed depended upon his ability to find a form of writ upon which his claim could rest.

The action of assumpsit seems to have come into common use about the reign of Queen Elizabeth. In the year 1601, in *Slade's* case (2), such an action was held to lie upon a simple contract though an action of debt would have lain for the same obligation. In that case it was determined that where the register has two writs it was the party's election to take either, but that a recovery or bar in an action on the case was a bar in an action of debt and vice versa. The ground of the decision appears to be that the party is put to his election, but though the case decides that the recovery or bar in the one case is a bar to the other action, the exact moment at which the choice of one form of action bars a subsequent reliance upon the other is left at large.

---

(1) [1900] 1 Q. B. 54, 65.

(2) 4 Co. Rep. 92 (*b*).

Whatever the reasoning upon which *Slade's* case (1) is founded and whether or not it decided that where the alternative forms of action were each contractual, no election had finally been taken until judgment or recovery, the position in a case where an action could be brought either in assumpsit or alternatively in trover was somewhat different. In *Dalston* v. *Janson* (2) it was held that assumpsit on a custom of the realm and trover could not be joined because "assumpsit is "quasi ex contractu and a contract and tort cannot be joined," and the pleas in both are not the same. An earlier decision in *Matthews* v. *Hopkin* (3) determined that on this ground a count against a carrier on the custom of the realm could not be joined with a count in trover.

But the tendency of the Courts was to mitigate the strictness of this rule and in *Dickon* v. *Clifton* (4) Wilmot C.J. held that counts on the custom of the realm and trover could be joined where the same judgment could be given on both counts. "It is objected," said he (5) "that the first count is laid "quasi ex contractu, and cannot be joined with trover; "supposing it was so, yet I should lay no great stress upon "old cases to this point at this day; but I think the first "count is laid to be ex delicto of the defendant, and as a "misfeasance, which may undoubtedly be joined with trover. "The true test to try whether two counts can be joined in "the same declaration, is to consider and see whether there "be the same judgment in both, and not whether they both "require the same plea, and wherever there is the same

---

(1) 4 Co. Rep. 92 (*b*).

(2) (1695) 1 Salk. 10.

(3) (1665) 1 Sid. 244.

(4) (1766) 2 Wils. (K. B.) 319.

(5) Ibid. 321.

"judgment in both, I think they may well be joined. I own "that in many books it is reported that trover and a count "against a common carrier cannot be joined, but common "experience and practice is now to the contrary." And in *Mast* v. *Goodson* (1) Blackstone J. said that originally all actions on the case were for torts " till the introduction of assumpsits "on mutuatus and other debts in the time of Queen "Elizabeth" : *Slade's* case. (2) "Since that introduction," he said, "we must distinguish whether the particular action "on the case before the Court is founded on tort or on "contract ; if the former it may be joined with any tort ; "if the latter, with any contract." In that case the action was brought on a special agreement to permit the plaintiff to land coals on the defendants' wharf with an action in trover for coals detained, and it was held that both actions were founded on tort and might be joined in one action. So, too, in *Brown* v. *Dixon* (3) where a count for trover and a count on the case for breach of an express or implied promise were joined, it was held by Buller J. that in both counts the action was upon case, that the same plea of not guilty went to the whole declaration and that the Court might give the same judgment on the whole. At the same time he repeated that assumpsit and tort could not be joined together. " The common "way," he added (4), " of declaring against a carrier is now "in assumpsit, to which trover cannot be joined, but if the "plaintiff declare on the custom of the realm, a count in trover "may be joined ; it only depends on the form of the action."

It appears, therefore, that the original ground of objection to pleading in assumpsit and tort in the same action was that counts in these two forms could not be joined, but that the plaintiff had his election, could sue in tort or could affirm the tortious act and thereby preclude himself from so suing. The questions, however, have still to be decided (1.) what amounted to such an affirmation, (2.) how far the strictness of the original doctrine remains in force to-day, and (3.) how far an election to proceed in indebitatus assumpsit against one defendant precluded or precludes the plaintiff from suing another and independent defendant in tort or for money had and received.

---

(1) (1773) 2 Wm. Bl. 848.
(2) 4 Co. Rep. 92 (*b*).
(3) (1786) 1 Term. Rep. 274.
(4) Ibid. 277.

Certainly it has always been held that the plaintiff may affirm a tort and preclude himself from suing the same party by accepting in full discharge the proceeds obtained by the tortious dealing with the plaintiffs' property. Such cases as *Wilson* v. *Poulter* (1), *Brewer* v. *Sparrow* (2), and *Lythgoe* v. *Vernon* (3) are examples of this principle. But these are instances of a plaintiff electing to receive something in satisfaction of his claim, and thereby precluding himself from denying that he has obtained his chosen remedy. On the other hand, where the proceeds are received by the plaintiff but not accepted in full discharge, he may still sue for the original wrong. *Burn* v. *Morris* (4), *Valpy* v. *Sanders* (5), *Davis* v. *Petrie.* (6).

In the present case the suggested affirmance is (*a*) by the bringing of an action in assumpsit against M. F. G. Trust, Ld., and (*b*) by lodging a proof in the winding-up of that company. As to (*a*) it is said on the strength of *Smith* v. *Baker* (7) that the mere issue of the writ is a final affirmance of the act of Emons in indorsing the cheque and of M. F. G. Trust, Ld., in receiving it and that by electing so to affirm Emons' action the plaintiffs were afterwards precluded from suing in trover. It is true that in that case, Bovill C.J. said (8): "But if an "action for money had and received is so brought, that is in "point of law a conclusive election to waive the tort; and "so the commencement of an action of trespass or trover is "a conclusive election the other way."

In that case, however, it was admitted by the plaintiff's counsel in opening that the bringing of an action and the recovery of the sum claimed would be a waiver of the tort so as to preclude any further action, and at the end of the argument on his behalf his counsel further admitted that it would obviously be unjust that, after bringing an action for

(1) (1730) 2 Strange 859.
(2) (1827) 7 B. & C. 310.
(3) (1860) 5 H. & N. 180.
(4) (1834) 4 Tyr. 485.
(5) (1848) 5 C. B. 886.
(6) [1906] 2 K. B. 786.
(7) L. R. 8 C. P. 350.
(8) Ibid. 355.

money had and received which involves the assumption that the plaintiff authorized the sale, the plaintiff should bring a fresh action of trover. Moreover Keating J. at one time said that it was admitted by the plaintiff's counsel that if the plaintiff had brought an action for money had and received that would amount to a conclusive election to waive the tort, and throughout does not appear to have drawn any distinction between bringing an action, judgment and recovery. The facts established were that the plaintiff had proved in the defendant's bankruptcy and received the proceeds of the sale of the defendant's property. The Court held that this was a final election and, as I understand them, held that in such a case the question whether the tort had been waived or not was one of fact. In these circumstances Bovill C.J.'s statement was plainly obiter, and the third member of the Court, Honyman J., appears to have founded his decision upon the ground that the plaintiff had obtained some advantage to which he would only have been entitled on the footing that the defendant's action was valid and that having obtained that advantage he could not afterwards say that the defendant's action was void. He went on to add, it is true, that the only footing on which the plaintiff could recover in an action for money had and received was by waiving the tort and treating the defendant as his agent. Of course, if the mere bringing of the action is a final election to treat the wrongdoer as the plaintiff's agent in the full sense of that term, it would be difficult logically afterwards to sue him for the wrong he had committed, but the agency is a notional one and the objection depends on the extent to which that notional idea is to be carried.

The ground upon which an action in assumpsit has often been said to be based is upon an implied promise. Indeed in *Moses* v. *Macferlan* (1), Lord Mansfield C.J. says that in all cases where ex æquo et bono the defendant ought to hand over money the law will imply a promise. The generality of this statement did not find universal acceptance and in cases such as *Marriott* v. *Hampton* (2) it was held that such a promise would not be implied in every case of that kind.

(1) (1760) 2 Burr. 1005.

(2) (1797) 7 Term. Rep. 269.

H. L. (E.)
1940
United Australia, Ld.
v.
Barclays Bank, Ld.
Lord Porter.

The general principle is set out by Lord Sumner in *Sinclair* v. *Brougham* (1) in the words: "All these causes of action "are common species of the genus assumpsit. All now rest, and "long have rested, upon a notional or imputed promise to repay." Whether or not this statement is true in all cases, it still has to be remembered that no such promise was ever in fact made. It is notional or imputed and before one is obliged to hold that an action upon such a fictional promise makes the wrongdoer the plaintiff's agent so as to bind him by his acts and precludes any reliance upon the wrong, one has to determine whether the fictional promise has the same effect as if it had actually been made.

In *Hunter* v. *Prinsep* (2), the master of a ship had wrongfully sold the goods of certain shippers and so converted them. The shippers sued in assumpsit without allowing freight and were held to be entitled to recover the whole proceeds as money had and received to their use, although it was contended that by adopting this form of action they had affirmed the sale and were liable for freight pro rata itineris as upon a right delivery of the goods at the place of sale. Lord Ellenborough said (3): "It was contended on the part of the "defendants that the money for which the goods sold is a "substitution for, and properly represents, the goods them- "selves: and that as the defendants would, if the goods had "subsisted in specie, have had a lien upon them for their "freight, and would be entitled to have carried them if they "could in the same ship, or to have hired another for that "purpose, and so to have earned their full freight: or, if the "plaintiff had taken them out of their hands before the voyage "was completed, would have been entitled to have claimed "freight pro rata itineris against him: so, now, the plaintiff "having sued for the proceeds in this form of action 'for "'money had and received,' has, in virtue of his so suing, "adopted and confirmed the act of the master, by which "the goods were converted into money, by which the "further conveyance of them in the course of the voyage was

---

(1) [1914] A. C. 398, 452.
(2) 10 East 378.
(3) 10 East 391.

"prevented, and by which of course the full freight of them "was prevented from being earned. But the fallacy of the "argument on the part of the defendants appears to us to "consist in attributing more effect to the mere form of this "action than really belongs to it. In bringing an action for "money had and received, instead of trover, the plaintiff "does no more than waive any complaint, with a view to "damages, of the tortious act by which the goods were "converted into money; and takes to the neat proceeds of "the sale as the value of the goods; subject of course to all "the consequences of considering the demand in question as "a debt, and, amongst others, to that of the defendants' "having a right of set off, if they should happen to have any "counter demand against the plaintiff."

So, too, in *Dalton* v. *Whittem* (1), a case in which the plaintiff sued in assumpsit for the value of severed fixtures and the defendant pleaded that the bringing of an action in this form justified the severance. Coleridge J. said: "It is like the "case of money had and received where the plaintiff's goods "have been wrongfully taken and sold. The action, to a "certain extent, assumes the legality of the sale: but still "the plaintiff may say that the property was not in the vendor. "The sale is, as it were, protested."

I quote these cases to show that the notional contract created between the parties was recognized as fictional and must not be pressed too far. In one of the earliest cases dealing with waiver of the tort of conversion, *Lamine* v. *Dorrell* (2), Holt C.J. suggests that nothing short of recovery in an action for money had and received may be a bar to an action in trover. His words are: "If an action of trover "should be brought by the plaintiff for these debentures after "judgment in this indebitatus assumpsit, he may plead this "recovery in bar of action of trover, in the same manner "as it would have been a good plea in bar for the defendant to "have pleaded to the action of trover, that he sold the "debentures, and paid to the plaintiff in satisfaction. But it "may be a doubt if this recovery can be pleaded before

---

(1) (1842) 3 Q. B. 961.

(2) 2 Ld. Raym. 1216.

"execution. This recovery may be given in evidence upon "not guilty in the action of trover, because by this action the "plaintiff makes and affirms the act of the defendant in the "sale of the debentures to be lawful, and consequently the "sale of them is no conversion."

Again in *Hitchin* v. *Campbell* (1), the assignees of a bankrupt sued a creditor who had levied his debt by fi. fa., after the act of bankruptcy. The assignees first sued the sheriff and the creditor in trover but a verdict was found for the defendants and judgment given accordingly. The assignees subsequently sued the defendant in assumpsit for the sum of 2155*l.* 6*s.* 5*d.* the value at which the sheriff had made a bill of sale to the defendant of the bankrupt's goods. To this claim the defendant pleaded amongst other defences that the plaintiff having made his election by bringing trover in the King's Bench in which he failed was barred thereby from bringing another suit for the same cause of action.

As to this contention De Grey C.J. giving the judgment of the Court said (2): " Another, and a much stronger objection "taken, was, that though the assignees may have their "election to bring either an action of tort or contract, yet "they cannot bring both; and, having elected to bring "trover, the judgment in that bars the action of assumpsit. This "depends upon two considerations: 1. Whether a man's "having once elected to proceed upon the tort bars him from "proceeding upon the contract. 2. Whether his proceeding "down to judgment does not bar him from trying the same "cause of action again. 1. As to the first: cases have been "cited to show that, where there are two different kinds of "remedies, real and personal, or otherwise specifically dis-"tinguished, a man's election of one prevents him from using "the other. He may distrain, or bring assize, but not both; "Litt. s. 588: may bring writ of annuity, or distrain, s. 219; "and his election is determined, even though he should not "recover after he hath counted thereon; Co. Litt. 145a. "But where both remedies are merely real, or merely personal, "there the election is not determined till the judgment on

---

(1) 2 Wm. Bl. 827.

(2) Ibid. 830.

"the merits. For a nonsuit on an action of account is no bar "to an action of debt; Co. Litt. 146a. And so must Holt in "12 Mod. 324 be understood to mean, 'that, if they bring one, "'they shall not afterwards bring the other' i.e., if the first "be brought to a due conclusion. 2. But in the present case "the action of trover went on to a verdict and judgment, "and appears, by the case stated, to have been for the same "cause of action. And upon this it is that the opinion of the "Court is founded. The rule of law is, nemo debet bis vexari "pro eâdem causâ."

The case sets out what was the common law principle, namely that if there were two different kinds of remedy such as real and personal action the plaintiff must elect which he will pursue, but if they are of the same kind then he need not elect. Now tort and assumpsit are both personal actions and therefore there should be no need of election. Nor would the mere bringing of one bar a subsequent action for the other. The decision rests upon the fact that the case was carried to judgment not upon any doctrine of election.

Finally in *Hambly* v. *Trott* (1) where an executor was unsuccessfully sued in trover on the ground that actio personalis moritur cum personâ, Lord Mansfield does not seem to have thought the bringing of the suit was a final election, as a result of which the plaintiff would be barred from suing in indebitatus assumpsit. He says (2): "upon principles of "civil obligation, another form of action may be brought, as "an action for money had and received."

No doubt it has been a common formula to state in cases of conversion that a plaintiff may bring an action in assumpsit for the proceeds of the thing converted and waive the tort. *King* v. *Leith* (3) and *Smith* v. *Hodson* (4), may be given as examples and in spite of the decision in *Hitchin* v. *Campbell* (5) the Courts have been accustomed to regard the actions of tort and indebitatus assumpsit as alternative and not complementary.

As was said by Lord Kenyon in the leading case of *Smith*

---

(1) (1776) 1 Cowp. 371.
(2) Ibid. 377.
(3) 2 Term. Rep. 141.
(4) (1791) 4 Term. Rep. 211.
(5) 2 Wm. Bl. 827.

v. *Hodson* (1): "Now here the assignees, by bringing this "action on the contract, recognized the act of the bankrupt, "and must be bound by the transaction in the same manner "as the bankrupt himself would have been."

But I do not think that in the statements made in the various Courts which decided these and similar cases, the judges who were parties to the decisions had before their minds the stage at which the election to affirm the action of the tortfeasor became final. Certainly in none of these cases was it necessary to determine that the mere bringing of an action was enough. The only definite assertion to that effect is, as I have said, in *Smith* v. *Baker* (2), but even in that case Bovill C.J.'s dictum was founded upon the analogy of *Buckland* v. *Johnson* (3), which was a case of joint conversion, and the real ground of the latter decision was that a verdict and judgment against one joint tortfeasor was a bar to a recovery against another. In that case Jervis C.J. thought, but thought wrongly, that a judgment in trover transferred the goods from the plaintiff to the defendant. It is now plain that nothing short of satisfaction effects such a transfer. But even if Jervis C.J. had been right, it was the judgment and not the bringing of the action which barred the claim.

The result of the cases is, I think, by no means decisive, nor is it clear that the mere issue of a writ is a final election on the part of the plaintiff to forgo his right to sue in tort even where the second action is brought against the same defendant. As has been pointed out, even in such cases there is much to be said in principle and authority against such a conclusion. It is not, however, necessary, having regard to the view that I express later, finally to determine whether the dictum of Bovill C.J. can be supported or not.

Nor do I think that the mere lodging of a proof in bankruptcy is a final election on the part of the plaintiff to waive the tort. Indeed *Rice* v. *Reed* (4) seems to me to be authority to the contrary, and even *Smith* v. *Baker* (2) recognizes that proceedings in bankruptcy are not to be treated as equivalent to

---

(1) 4 Term. Rep. 211, 217.
(2) L. R. 8 C. P. 350.
(3) 15 C. B. 145.
(4) [1900] 1 Q. B. 54.

BIBL. LONDIN UNIV.

the bringing of an action, and points out that the question whether the steps taken in those proceedings are a final election or not is a question of fact dependent upon the evidence.

If, as in *Morris* v. *Robinson* (1), a demand from a Vice Admiralty Court for money received by it from the tortious sale of goods is not a bar to a subsequent action in trover, I find it difficult to think that the mere lodging of a proof in bankruptcy is evidence of a final election.

So far I have been considering the question whether the bringing of an action for money had and received is a waiver of the right to bring an action in tort against the same defendant, and have pointed out that the allegation in *Smith* v. *Baker* (2) to the effect that it was, is at least open to considerable doubt. But let me assume that where an action is brought against a defendant the issue of the writ finally determines the right of the plaintiff against that defendant and is a bar to an action against him in a form other than that adopted in the writ, i.e., an action in assumpsit is a bar to a subsequent action in tort founded upon the same facts, and vice versa. The question still remains, is such a proceeding also a bar against the bringing of an action in either of these two forms against another defendant, i.e., if there are two separate tortfeasors who have committed separate torts in respect of the same property and the plaintiff elects to sue one in indebitatus assumpsit, is he precluded from thereafter suing the other either in tort or for money had and received ? This is the problem posed but not solved by Lord Haldane in *John* v. *Dodwell.* (3)

It is plain that an action against one such separate tortfeasor for conversion is no bar to an action against another, nor indeed does the signing of judgment against the first end the matter. The plaintiff can even then proceed to judgment against the second, and his rights are not exhausted until from one or both he has obtained the full measure of his loss. If the option be an option to sue in one form or the other, prima facie an action for money had and received against one tortfeasor should be no bar to an action in the same form against another, since the plaintiff by waiving the tort in the one case even if he be held to have waived the tort in the other case, would still have an action in contract left to him in each. Indeed, as I have said, the only way in which the argument could succeed would be by saying that the action for money had and received recognized the tortious act as done by the plaintiffs' authority, and by applying this allegation to the facts of the present case to say that the plaintiffs by suing M. F. G. Trust, Ld., for money had and received, affirmed the act of Emons in indorsing the cheque in favour of that company, and thereby affirmed the act of the bank in collecting the proceeds of the cheque for the company to whom it was endorsed.

---

(1) 3 B. & C. 196.
(2) L. R. 8 C. P. 350.
(3) [1918] A. C. 563, 570.

Some support for this proposition is to be found in *Hovil* v. *Pack*. (1) The facts are not of much assistance, but Lord Ellenborough C.J. is reported to have said (2): "If you "adopt De Beaume as your agent on your own behalf; you "must adopt him throughout, and take his agency cum onere. "Your action, if any, must be against De Beaume; but it is "impossible you can follow the money into the hands of the "defendant to whom it has been paid by your adopted agent. "If this could be done, by the same rule you might follow it "still further through other hands. But if the defendants "had paid it over to another, could you pretend to have the "same right to follow it?"

This opinion, however, was his alone. Lawrence J. and Le Blanc J. founded their concurrence on no such general proposition but on the fact that in the case which they were considering the money sought to be recovered was not the proceeds of any property of the plaintiff but had been received from a third party.

Nor do I think that support for the argument can be obtained from *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co., Ld.* (3), a case in which goods had been mistakenly delivered by forwarding agents to certain customers of the plaintiffs, and the plaintiffs had afterwards invoiced the goods to the customer and recovered judgment against him. Both Bankes and Scrutton L.JJ. spoke of the inability to approbate and reprobate, and Bankes L.J. said (1): "Having elected to treat the delivery to him as an authorized "delivery they cannot treat the same act as a misdelivery." But the case was obviously one where the defendants were purporting to act as agents for the plaintiffs in handing over the goods and is an example of true ratification. As it is put by Atkin L.J. (2): ". . . . they affirmed and ratified the act "of the forwarding agents. Having done that they cannot "afterwards sue the agents as having acted in breach of their "mandate."

---

(1) (1806) 7 East 164.
(2) Ibid. 166.
(3) [1921] 2 K. B. 608.

It is a case in which agents acted in the mistaken belief that they had authority and the principals afterwards ratified the authority which the agents thought they had. No question of notional or implied contract, or as it is called quasi contract, arose.

Where, however, the fiction of a contract has to be resorted to, the same principles are not necessarily applicable. The question then is to what extent must the fiction be carried. In *Davis* v. *Petrie* (3) the trustee under a deed of assignment which was also an act of bankruptcy received from the defendant a debt due from her to the assignor. The assignor was afterwards made bankrupt and the plaintiff was appointed trustee in the bankruptcy and received from the trustee under the deed about one-fifth of the money collected by him. He then sued the defendant for the original debt and in answer she pleaded that by receiving money from the trustee under the deed the trustee in bankruptcy had affirmed the action of the former in collecting money from those indebted to the bankrupt and could not afterwards sue them in respect of their debts. Collins M.R. refused to treat the action of the plaintiff in receiving the money from the trustee under the deed as an election to affirm his acts. If the defendant could have proved that her money had reached the trustee, such proof, it was true, would have been a

(1) [1921] 2 K. B. 611.
(2) Ibid. 612.
(3) [1906] 2 K. B. 786.

defence, pro tanto, against a claim in debt against her, but short of such proof there was no defence to the action. Fletcher Moulton and Farwell L.JJ. gave judgment to the same effect.

Even if the Courts had at the time when indebitatus assumpsit first came into favour felt themselves bound to hold that because a count in such an action could not be joined with a count for trover, because tort and contract could not be dealt with in the same action, and that, therefore, a plaintiff in choosing one form of action or the other must be taken finally to have exercised an election between the alternate remedies open to him, yet it does not follow that the same principle would apply to-day. Forms of action were abolished by the Common Law Procedure Act, 1852, and the Judicature Act, 1875, empowered all courts to apply the principles of law and equity alike in all courts and provided that in case of conflict the principles of equity should prevail. In these circumstances there seems little reason why the Court should feel itself hide-bound by matters which concern form and not substance—fiction and not reality. This view is expressed by Pickford L.J. in *Maskell* v. *Horner* (1) when he says: "The point taken on behalf of the defendant was "that as distress was the legal remedy for non-payment of "tolls, a threat to distrain was like a threat to bring an action, "and a payment made in consequence of it could not be "recovered back in an action for money had and received. "In support of this contention, *Knibbs* v. *Hall* (2), *Lindon* v. "*Hooper* (3) and *Gulliver* v. *Cosens* (4) were cited. I do not "think these cases support the proposition. So far as they "are not decisions upon points of pleading and forms of "action not now material, they only decide that in the case "where there is a right to distrain but a complaint that there "was a distress for too much, replevin and not money had and "received is the proper remedy."

The reference to points of pleading and forms of action not now material is as applicable to cases of assumpsit and waiver of tort as it is to those cases mentioned by the learned Lord Justice.

---

(1) [1915] 3 K. B. 106, 126.
(2) (1794) 1 Esp. 84.
(3) (1776) 1 Cowp. 414.
(4) (1845) 1 C. B. 788.

The fiction forming the basis of the action of assumpsit may be an implied promise but the substance is the right of the plaintiff to recover property or its proceeds from one who has wrongfully received them and if the realities of the matter are kept in mind I see no reason why the party deprived of his property should be precluded from suing a second wrongdoer either in trover or for money had and received because he had previously sued another wrongdoer in assumpsit, nor do I see any difference in substance between a case where the plaintiff sues successive wrongdoers in conversion (in which he can admittedly recover judgment against each) and a case in which he proceeds against the first defendant in assumpsit and not trover.

It will be observed that this conclusion leaves undetermined the extent to which a plaintiff choosing between trover and assumpsit is bound by an election when the whole of the facts were not before him when his choice was made.

The respondents argued that if you elect to sue in assumpsit you elect to subject yourself to all the incidents of your choice including the possibility that you thereby waive a tort committed by another tortfeasor in respect of the same property ; the appellants that in this and in all cases of election no binding choice is made unless all the material facts were present to the mind of the person upon whom the obligation to elect falls.

No decision as to these arguments is necessary having regard to the views I have expressed, and I do not find myself compelled to pronounce between them.

For the other reasons which I have set out I think the appeal should be allowed.

Appeal allowed and judgment entered for the appellants for 1900*l. with interest at four per cent. as from November* 12, 1934.

Solicitors for appellants : *King Hamilton & Co.*
Solicitors for respondents : *Durrant Cooper and Hambling.*

Applied. Boiler, etc., Co. of Canada v. Sherwin-Williams Co. Ld. [1951] A. C. 319

[PRIVY COUNCIL.]

J. C.*
1940
Sept. 24.

CANADA RICE MILLS, LIMITED . . APPELLANTS;

AND

UNION MARINE AND GENERAL INSURANCE COMPANY, LIMITED RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Canada (British Columbia)—Insurance (Marine)—Cargo of rice—Damaged by heat caused by closing of ventilation during voyage—Closing of ventilators the proximate cause of the damage—Weather and sea while ventilators closed such as to constitute a "peril of the "sea"—Loss due to peril of the sea—Marine Insurance Act, R. S. B. C., 1936, c. 134, s. 57; Sched. Rule 7—Inference of fact by Appeal Court—Rules of the Supreme Court, Order LVIII., *r.* 4.

The appellants insured with the respondents a cargo of rice under a floating policy of marine insurance which covered, among other risks, perils of the sea, and also, under the general words, "all other perils losses and misfortunes that have or shall come "to the hurt detriment or damage of the subject matter of this "insurance." On arrival at the port of discharge it was found that the rice had heated, and on a claim by the appellants under the policy to recover loss sustained, the special jury, in answer to specific questions, found that the rice was damaged by heat caused by the closing of the cowl ventilators and hatches from time to time during the voyage; that such closing was the proximate cause of the damage; and that the weather and sea during the time the ventilation was closed were such as to constitute a peril of the sea. The jury were not asked, however, whether the peril of the sea was the cause of the closing of the ventilators and hatches. On those findings judgment was entered for the appellants, but was set aside on appeal on the ground that there was no evidence of perils of the sea, and that, even if there were perils of the sea, they did not constitute the causa proxima for the purposes of insurance law, the causa proxima being the deliberate act of closing the ventilation:—

Held, first, that with regard to the omission to ask the jury if the peril of the sea was the cause of the closing of the ventilation the connection was so obvious that the Court would be justified in acting upon Order LVIII., r. 4, of the Rules of Court of British Columbia—which is identical with Order LVIII., r. 4, of the Rules of the Supreme Court in England—and, if necessary, drawing the inference of fact that the closing was so caused.

---

* *Present:* VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT and LORD PORTER.

Decision in *McGovern* v. *James Nimmo & Co.* (1938) 107 L. J., P. C. 82, not applicable to English or British Columbia appeals.

Held, secondly, that where there is an accidental incursion of seawater into a vessel in a manner and at a part of the vessel where seawater is not expected to enter in the ordinary course of things, as through uncovered cowl ventilator openings during stormy weather, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the sea. It is the fortuitous entry of the seawater which is the peril of the sea in such cases, and whether in any particular case there is a loss by such peril is a question of fact for the jury, who are entitled to take a broad commonsense view of the whole position.

Wilson, Sons & Co. v. *Owners of Cargo per the " Xantho "* (1887) 12 App. Cas. 503, at 509; *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887) 12 App. Cas. 518; and *Mountain* v. *Whittle* [1921] 1 A. C. 615, referred to.

Held, thirdly, that the damage to the rice which was caused not by the incursion of seawater, but by action necessarily and reasonably taken to prevent the incursion—the peril of the sea—affecting the rice was a loss due to the peril of the sea and was recoverable as such.

Dictum of Kelly C.B. in *Stanley* v. *Western Insurance Co.* (1868) L. R. 3 Ex. 71, at 74, approved.

Held, lastly, that the loss was also recoverable as falling within the general words of the policy.

Butler v. *Wildman* (1820) 3 B. & Ald. 398, and *The Knight of St. Michael* [1898] P. 30, approved.

Judgment of the Court of Appeal for British Columbia [1939] 2 D. L. R. 306 reversed.

Appeal (No. 25 of 1939) from a judgment of the Court of Appeal for British Columbia (February 1, 1939) setting aside a judgment in the Supreme Court in an action tried with a special jury (May 31, 1938).

In the action out of which this appeal arose the appellants, Canada Rice Mills, Ld., claimed as assured under a floating policy of marine insurance, dated December 19, 1929, issued by the respondents, the Union Marine and General Insurance Company, Ld., upon shipments of rice as from time to time declared under the policy. The policy covered (inter alia) perils of the sea, and also, under the general words, "all "other perils losses and misfortunes that have or shall come "to the hurt detriment or damage of the subject matter of "this insurance." The goods were warranted free of particular average under three per cent. on each package. Under that policy the appellants duly declared a full cargo of 50,600 bags of rice shipped on or about April 23, 1936, in the motor vessel *Segundo* at Rangoon for their dock on the Fraser River, British Columbia. Included in the shipment so declared were 7500 bags of brown rice, bearing the shipping marks 163 and 102, and valued at $30,798. The *Segundo* arrived at the Fraser River on May 28, 1936, and on discharging her cargo it was found that the whole of the rice had heated. By reason, however, of the franchise of three per cent. in the case of particular average, and also because the rice in the bags marked 163 and 102 was of finer quality, it was decided that the claim against the respondents should be limited to those marks. The appellants claimed that the damage was due to interference with the ventilation consequent on bad weather during the voyage which necessitated the closing of the cowl ventilators which were normally kept open to ensure through ventilation in the holds, and that therefore the rice was damaged by a peril of the sea. The respondents contended (inter alia) that the damaged condition of the rice was not due to perils insured against, but to inherent vice in the rice itself when shipped. The sum claimed by the appellants was $8071.

At the trial, which took place in the Supreme Court of British Columbia, before Robertson J. and a special jury, the jury found, in answer to specific questions submitted to them, that the rice was in good and sound condition when shipped; that it was damaged by heat caused by the closing of the cowl ventilators and hatches from time to time, and that such closing was the proximate cause of the damage; and that the weather and sea during the time the cowl ventilators and hatches were closed were such as to constitute a peril of the sea.

On those findings judgment was entered for the appellants.

An appeal by the present respondents to the Court of Appeal for British Columbia (Martin C.J.B.C. and Sloan J.A., McQuarrie J.A. dissenting) was allowed, and the action dismissed, the majority of the Court of Appeal being of opinion that on the facts of this case it could not be said as a matter of law that the loss was caused by a peril of the sea, and that in any event the jury did not find as a fact that a peril of the sea was the proximate cause of the loss.

The appeal is reported at [1939] 2 D. L. R. 306.

The appellants now appealed.

1940. July 23, 24, 25, 29. *Valentine Holmes* for the appellants. The peril of the sea relied upon was a storm encountered by the vessel which caused the ventilators to be closed, with the result that the cargo in question became heated, and damaged to an extent which exceeded the franchise allowed by the policy. There is no dispute about the cargo being damaged by heat, and it is not suggested that the judge misdirected the jury. Throughout it was accepted by everybody that the ventilators were closed by reason of wind and weather. The appellants have the findings of the jury in their favour, and the answers of the jury, fairly construed, result in finding that the appellant's loss was caused by a peril of the sea, and support the judgment pronounced by the trial judge. The majority of the Court of Appeal erred in deciding that the jury did not find as a fact that the loss was caused by a peril of the sea, and also erred in law in deciding that on the facts found by the jury it could not be said that the loss was caused proximately by a peril of the sea. Unless this Board is going to take the very narrow view, the burden is now upon the respondents to show that the loss was not caused by a peril of the sea.

H. U. Willink K.C. and *Cyril Miller* for the respondents. The question, what was the cause of the damage suffered, is one of fact proper to be submitted to the jury, and the only question for the Appellate Court is whether on the answers of the jury the appellants were entitled to judgment. That being the question, the first matter is as to the material which an Appellate Court will examine in considering that question. The jury were not asked whether the peril of the sea was the cause of the closing of the ventilation, and there was no finding of fact by the jury that the proximate cause of the damage was a peril of the sea, or that the peril of the sea as found was the proximate cause. The Appellate Court were not, as they held, entitled to go beyond the findings of the jury and supply a missing question and answer: *McGovern* v. *James Nimmo & Co.* (1) [Reference was made on this point to R. S. C., Order LVIII., r. 4, and to *The Thrunscoe* (2), *McPhee* v. *Esquimalt and Nanaimo Railway Co.* (3), and to *Paquin, Ld.* v. *Beauclerk.* (4)] The closing of the hatches and ventilators found to be the proximate cause of the damage was not a peril of the sea. Unless the questions and answers of the jury, taken together, on their true construction amount to a finding that damage to the extent claimed was proximately caused by perils of the sea, or, alternatively, unless these answers, together with other material, make that conclusion inevitable, the appellants fail because they have not established their cause of action. This loss was not caused by perils of the sea. The jury said that it was caused by the closing of the ventilators; they have not found that the closing was related in any way to the perils of the sea; all that they have said is that during the period when the ventilators were closed the weather was such as to be a peril of the sea. [On the meaning of "perils of the "sea" reference was made to the English Marine Insurance Act, 1906, s. 7; and on the meaning of "proximate cause" to *Becker, Gray & Co.* v. *London Assurance Corporation* (5), and *Attorney-General* v. *Adelaide Steamship Co.* (6)] Taking the answers of the jury as a whole, it is submitted that they have chosen to say that they cannot find that it was the peril of the sea which caused the damage, but that the proximate cause was the closing of the ventilators and hatches from time to time during the voyage. That is their solution. They said that they were not satisfied that the marine conditions were the cause of the closing which caused the heat. They have not gone behind the closing.

If the cause of the damage is fortuitous, as arising from weather, rain, etc., and not from sea perils insured against, then there is an optional cover, which covers heat, sweat, mould, irrespective of percentage. The appellants neglected to insure against fortuitous heat per se, which was the cause of the present damage, and insured against perils of the sea, which did not cause this damage.

---

(1) (1938) 107 L. J., P. C. 82.
(2) [1897] P. 301.
(3) (1913) 49 S. C. R. (Can.) 43.
(4) [1906] A. C. 148, 160.
(5) [1918] A. C. 101, 112.
(6) [1923] A. C. 292, 302–5.

Valentine Holmes replied, and referred to *McGovern* v. *James Nimmo & Co.* (1)

Sept. 24. The judgment of their Lordships was delivered by LORD WRIGHT. The appellants claimed in this action as assured under a floating policy of marine insurance, dated December 19, 1929, upon shipments of rice imported by the appellants to their rice mills in British Columbia, as from time to time declared under the policy. The policy covered (among other risks) perils of the seas, and also, under what are often described as the general words, "all other perils "losses and misfortunes that have or shall come to the hurt "detriment or damage of the subject matter of this insurance." The goods were warranted free of particular average under three per cent. on each package. The seaworthiness of the ship as between the assured and the assurers was admitted. Under this policy the appellants duly declared a full cargo of 50,600 bags of rice, weighing 5080 tons, shipped on or about April 23, 1936, in the motor vessel *Segundo* at Rangoon for their dock on the Fraser River. The bags were valued in all at $191,922. Included in the shipment so declared were 7500 bags of brown rice, valued at $30,798, marked 163 and 102. The shippers were Blackwood Ralli & Co., of Rangoon. The claim is made in respect of the rice declared under these two marks, which are compendiously referred to as 163. No claim is made in respect of the other marks shipped, which bore respectively the marks K.G., A.L.Z., and N.L.Z. The respondents issued a certificate of insurance in respect of the whole shipment.

The *Segundo* was a motor vessel of 4414 tons gross and 2668 tons net, registered at Oslo. She had five holds. The bags of the marks 163 and 102 were stowed partly in No. 2

---

(1) 107 L. J., P. C. 82, 86.

hold, which was forward of the engine and boiler space, and partly in No. 3 hold, which was aft of that space. The cargo throughout was well dunnaged, and was stowed with adequate air spaces. There were also vertical wooden trunk ventilators and ordinary wooden rice ventilators in each hold. The system of ventilators throughout consisted of cowl ventilators with, in addition, Samson post ventilators at each hold. These latter were always open, but it was necessary that the cowl ventilators should be also open to ensure a through current of air in the holds. There is no complaint of the sufficiency of the ventilation system.

The *Segundo* arrived at Fraser River on May 28, 1936. It was then found that all the rice had heated, but by reason of the franchise of three per cent. in the case of particular average, and also because the rice in the bags marked 163 and 102 was of finer quality, it was decided that the claim against the respondents as insurers should be limited to these marks.

A primary issue in the action was what was the condition of the rice on shipment, since it was contended that the damaged condition of the rice was not due to perils insured against, but to the inherent vice of the goods when shipped. On that issue a commission to take evidence went to Rangoon, where a large number of witnesses gave evidence. At the trial, which took place in the Supreme Court of British Columbia before Robertson J. and a special jury, and lasted for seven days, the jury, as will appear later, found that the rice was in good and sound condition when shipped. No complaint has been made of the summing-up. There was abundant evidence to justify the jury's finding on that issue, which was accordingly concluded in the appellants' favour. The question therefore remained whether the appellants had established that the damage was due to perils insured against. The appellant's case was that the damage was due to interference with the ventilation consequent on bad weather during the voyage, which caused the closing of the cowl ventilators which it was necessary to keep open to ensure through ventilation. The evidence was that rice is a commodity

J. C.
1940

Canada Rice Mills, Ld.
v.
Union Marine and General Insurance Co.

very liable to heat if not fully ventilated while being carried in the ship's hold. It has a considerable moisture content, and has a capacity of absorbing further moisture. If this moisture is not carried off by ventilation a process of fermentation sets in and damages the grain. The heating thus caused when the ventilation was shut off would tend to develop even after full ventilation was restored. The ventilators have to be closed when water would get to the cargo if they are not closed. When the ventilators are again opened the cooler air circulating through them also sets up a condensation in the hot, moist and humid atmosphere of the hold, and precipitates moisture on the rice. If a process of fermentation is thus started it may go on for the rest of the voyage, even though the ventilators are not again closed.

In a case of damage to cargo such as the present, the evidence from those in the ship of what happened during the voyage is vital, and is generally given by the ship's officers. But in this case, a translation of the ship's log was accepted as the sole evidence from the ship. It is necessarily very brief in its narrative, and might well have called for explanation on many points. But, such as it was, it was put to the jury as the material for their decision on this aspect of the case. They were called upon to make such findings or draw such inferences of fact from the log as seemed to them to be right, with the aid of such expert evidence as was laid before them.

The log shows that from April 24, 1936, the day on which the *Segundo* sailed from Rangoon, until April 27, 1936, when she was in the Straits of Malacca, the ventilators were not closed. On that day for some short period the ventilators were covered "on account of unsettled weather," and later in the day they were again covered on account of rain, until the next day. Then, for a few hours on the night of April 30, 1936, they were again covered on account of rain, and yet again covered on account of heavy showers for a few hours on May 1, 1936. Thereafter there is no entry of any moment until May 8, 1936.

The learned judge, in summing-up, told the jury that the case of the appellants, which was that the damage was caused by the closing of the cowl ventilators and hatches during the voyage, really came down to the question of the period from May 8 to 13. The 13th, it is clear, should read as the 11th. Either the judge made a momentary slip or he was misreported. It is therefore necessary particularly to examine the log entries from May 8 to 11. The vessel was on the 8th driving against heavy head seas, with much pitching. At 19.30 (or 7.30 P.M.) the covers were put on the ventilators owing to rain. On the 9th, the log records heavy head seas, pitching and spray over decks and hatches, and similar entries throughout the day, with half a gale or a fresh gale. On the 10th there are similar entries, continuous heavy head seas, spray over fore deck, and later in the day the entry was that she was shipping some seas over the forepart of vessel. About mid-day the wind became a strong gale with hurricane-like squalls at times. The vessel was driving into a head wind and sea, with pitching and rolling, at times described as tremendous. At 1 A.M. on the 11th the covers were removed from the hatches. It is this period in particular, May 9 and 10, which the appellants rely on as involving a long continuous interruption of ventilation, and as causing the heating and fermentation which was eventually discovered at the end of the voyage. Captain Brown Watson, an expert called on behalf of the respondents, agreed that on the 9th and 10th there was reason for closing the ventilators at least on the forward end to prevent damage to cargo, that is, to prevent the cargo getting wet. He did seem disposed to draw a distinction between the forward end and the after end of the ship, but no attempt was made to distinguish different parts of the damaged rice, and the jury, with the material they had before them, were entitled to find, if so minded, that the ventilators were properly closed on the 9th and 10th for the safety of the cargo, and to reject the distinction between the different holds suggested by Captain Brown Watson. On the 15th there is an entry that covers were put on the ventilators owing to humidity or fog, but only for a few hours, and similarly for a few hours on the 16th and on the 17th. Later on that day the vessel ran into

J. C.
1940
CANADA RICE MILLS, LD. v. UNION MARINE AND GENERAL INSURANCE CO.

bad weather, and shipped some spray over the decks, but the wind was a following wind, and the ventilators were not closed, except for a brief period on the 18th, when there was a heavy sea and a gale, that again was a case of a following sea and gale. On the 25th and 26th, for about twenty-one hours, the ventilators were closed on account of rain. On the 28th the vessel arrived at Fraser River. It thus appeared that for about fifty odd hours on the 9th and 10th there was a continuous closing of the ventilators, and evidence on which the jury might find that it was due to conditions of wind and sea, and that it was the cause of the damage. The closing of the ventilators on account of rain was for brief periods. Rain is not a peril of the sea, but at most a peril on the sea. But there is now no real issue that the damage was due to rain.

At the conclusion of the case, after lengthy arguments, the jury were required to give a special verdict on specific questions. Question 3 dealt with the condition of the rice on shipment. It was answered in favour of the appellants, as already stated. Questions and answers 6 to 10 should be set out in full :—
"6. Was the said shipment damaged by heat caused by the "closing of the cowl ventilators and hatches from time to "time during the voyage ? Answer : Yes. 7. If the answer "to No. 6 is in the affirmative, was the closing of the ventilators "and hatches the proximate cause of the damage ? Answer : "Yes. 8. Was the weather and sea during the time the cowl "ventilators and hatches were closed such as to constitute "a peril of the sea ? Answer : Yes. 9. If the answer to "No. 8 is in the affirmative, what were the conditions of the "weather and sea ? Answer : Heavy winds from 8th to "11th May, with high seas ; from 11th to 17th, moderate "weather and moderate seas, after which latter date, strong "gales and very rough seas up to 20th ; variable seas and "weather after that date. 10. Did the plaintiff thereby suffer "loss exceeding 3 per cent. on each package ? Answer : "No; only on 163."

Some discussion took place both in the Courts of British Columbia and before their Lordships on the form of questions 7 and 8, in particular in regard to the word "proximate" in 7, and in regard to the omission to ask the jury if the peril of the sea was the cause of the closing of the ventilators and hatches. On this latter point their Lordships would feel justified, if it were necessary, to act upon Order LVIII., r. 4, of the Rules of Court of British Columbia. That rule is identical with Order LVIII., r. 4, of the Rules of the Supreme Court in England, which gives the Court of Appeal power (inter alia) to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require, as well as to receive further evidence. The rule is intended to obviate a new trial in cases where such a course can properly be avoided, and applies even in cases tried with a jury. In the present case the jury have found that there were perils of the sea during the period while the ventilators were closed. What is wanting is the finding that there was not merely concurrence in time, but that the perils of the sea caused the closing. The connection is so obvious that, if necessary, the Court is entitled to draw an inference of fact that the closing was so caused. Their Lordships were referred to a decision of the Supreme Court of Canada, *McPhee* v. *Esquimalt and Nanaimo Railway Co.* (1), in which the rule was discussed. The English rule has frequently been discussed in English Courts, for instance, in *Paquin, Ld.* v. *Beauclerk* (2), and *Mechanical and General Inventions Co. and Lehwess* v. *Austin and the Austin Motor Co.* (3) In the present case the Court of Appeal in British Columbia regarded themselves as precluded from going beyond a narrow reading of the findings of the jury by a decision of the House of Lords in *McGovern* v. *James Nimmo & Co.* (4), where Lord Atkin said that the Court cannot itself supply an answer to a missing question. That decision was, however, in an appeal from the Scotch Courts, where there is no rule corresponding to Order LVIII., r. 4, and where the Appellate Court has only the record and verdict before it. In their Lordships' judgment, the decision

---

(1) 49 S. C. R. (Can.) 43.
(2) [1906] A. C. 148.
(3) [1935] A. C. 346.
(4) 107 L. J., P. C. 82.

J. C.
1940
Canada Rice Mills, Ld. v. Union Marine and General Insurance Co.

in *McGovern's* (1) case cannot in view of Order LVIII., r. 4, be applied to English or British Columbia appeals. But, in truth, their Lordships are of opinion that the difficulty can be more simply dealt with. The jury answered the specific questions put to them. Why there was no express question directed to the causal relationship between the closing of ventilation and the perils of the sea is not material. The judge is responsible for the questions put, and the jury have only these questions before them. It may be that all concerned thought the connection too obvious to call for a special question. No doubt some confusion has been introduced by the form of question 7, was the closing of ventilation the proximate cause of the damage? But if the questions and answers are construed fairly, and construed as a whole, it is, in their Lordships' judgment, clear that what was meant by proximate was "last in time." The judge in summing-up directed the jury's special attention by putting question 8, to the fact that the policy insured the plaintiff against damage to the rice arising from perils of the sea. Thus the idea of causal nexus was brought to their minds. Question 9, or perhaps the answer, is somewhat difficult to understand, but the answer at least deals specifically with the crucial period from May 8 to 11, describing it as a period of heavy winds and high seas. The period of the voyage up to the 8th is not treated as material, and the subsequent part of the voyage may be disregarded.

On these findings, supplemented by further findings as to the amount of damage, the judge entered judgment for the appellants. The Court of Appeal, by a majority, set aside that judgment, mainly, as it seems, on grounds of law. There was, it was held, no evidence of perils of the sea. The conclusion appears to have been based on a view as to the meaning of perils of the sea. It was held, however, that even if there were perils of the sea, they did not constitute the causa proxima for purposes of insurance law, because the causa proxima was the deliberate act of the master in closing the ventilation. These points are fully developed in the

(1) 107 L. J., P. C. 82.

judgment of Sloan J.A. Martin C.J., in agreeing with the reasons of Sloan J.A., rather emphasized the purely verbal aspect of the jury's finding as to the proximate cause, and thought that so far from finding that the peril of the sea was the proximate cause of the loss, they had come to the conclusion that the loss was due to something else, namely, the closing of the ventilators. On this matter their Lordships have already expressed their opinion.

Their Lordships are unable, with all respect, to agree with the reasoning of Sloan J.A. in his careful opinion, and in the arguments advanced before them in support of it. The two main questions must be discussed separately.

The first question, whether on the evidence the jury were justified in finding that there was a peril of the sea, depends on the meaning to be attached to those words in a policy of marine insurance. The trial judge directed the jury that the words referred to fortuitous accident or casualty of the seas, but did not include the ordinary action of the wind and wave. In British Columbia the law of marine insurance is now to be found in the Marine Insurance Act, R.S.B.C., 1936, c. 134, which is for all practical purposes the same as the English Marine Insurance Act, 1906, which was a codifying Act. Authorities under the latter Act are properly cited as authorities in respect of the former. The judge in his direction to the jury was quoting r. 7 in the First Schedule to the Act. In considering the material questions it is helpful in the first instance to assume that the ventilation was not closed, but that the sea or spray had actually wetted the rice and caused the damage. The other question, that of the causa proxima, can then be considered separately. The view of Sloan J.A. seems to be that there was no peril of the sea because, in his opinion, the weather encountered was normal, and such as to be normally expected on a voyage of that character, and that there was no weather bad enough to endanger the safety of the ship if the ventilators had not been closed. But these are not the true tests. In the House of Lords in *Wilson, Sons & Co.* v. *Owners of Cargo per the*

" *Xantho* " (1), which was a bill of lading case, but has always been cited as an authority on the meaning of the same words in policies of marine insurance (see per Lord Bramwell in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2)), Lord Herschell said (3): " The purpose of the policy is to secure an indemnity "against accidents which may happen, not against events "which must happen. It was contended that those losses "only were losses by perils of the sea, which were occasioned "by extraordinary violence of the wind or waves. I think "this is too narrow a construction of the words, and it is "certainly not supported by the authorities, or by common "understanding. It is beyond question, that if a vessel "strikes upon a sunken rock in fair weather and sinks, this "is a loss by perils of the sea." In *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (4) Lord Macnaghten said that it was impossible to frame a definition of the words. In *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (5), where a rat had gnawed a hole in a pipe, whereby seawater entered and damaged the cargo, there was no suggestion that the ship was endangered, but the damage to the cargo of rice was held to be due to a peril of the sea. There are many contingencies which might let the water into the ship besides a storm and, in the opinion of Lord Halsbury in the case last cited, any accident that should do damage by letting in sea into the vessel should be one of the risks contemplated.

Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the sea water which is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury. There are many deck openings in a vessel through which the seawater is not expected or intended to enter and, if it enters, only enters by accident or casualty. The cowl ventilators are such openings. If they were not closed at the proper time to prevent seawater coming into the hold, and seawater does accidentally come in and do damage, that is just as much an accident of navigation (even though due to negligence, which is immaterial in a contract of insurance) as the improper opening of a valve or other sea connection. The rush of sea water which, but for the covering of the ventilators, would have come into them and down to the cargo was in this case due to a storm which was sufficiently out of the ordinary to send seas or spray over the orifices of the ventilators. The jury may have pictured the tramp motor vessel heavily laden with 5000 tons of rice driving into the heavy head seas, pitching and rolling tremendously and swept by seas or spray. Their Lordships do not think that it can properly be said that there was no evidence to justify their finding. On any voyage a ship may, though she need not necessarily, encounter a storm, and a storm is a normal incident on such a passage as the *Segundo* was making, but if in consequence of the storm cargo is damaged by the incursion of the sea, it would be for the jury to say whether the damage was or was not due to a peril of the sea. They are entitled to take a broad commonsense view of the whole position. How slight a degree of the accidental or unexpected will justify a finding of loss by perils of the sea is illustrated by *Mountain* v. *Whittle* (1), where a houseboat, the seams of which above the water-line had become defective, was towed in fine weather and in closed water in order to be repaired. A powerful tug was employed, and this caused a bow wave

---

(1) (1887) 12 App. Cas. 503.
(2) (1887) 12 App. Cas. 518, 527.
(3) Ibid. 509.
(4) (1887) 12 App. Cas. 484, 502.
(5) 12 App. Cas. 518.

(1) [1921] 1 A. C. 615.

so high as to force water up into the defective seams. There was no warranty of seaworthiness. "Sinking by such a "wave," said Lord Sumner (1), "seems to me a fortuitous "casualty; whether formed by passing steamers or between "tug and tow, it was beyond the ordinary action of wind "and wave, or the ordinary incidents of such towage." In the same way storms at sea may be frequent, in some cases seasonal, like typhoons in the China Seas, a ship may escape them, and they are outside the ordinary accidents of wind and sea. They may happen on the voyage, but it cannot be said that they must happen. In their Lordships' judgment, it cannot be predicated that where damage is caused by a storm, even though its incidence or force is not exceptional, a finding of loss by perils of the sea may not be justified.

There remains the second question, whether the damage which was caused not by the incursion of sea water, but by action taken to prevent the incursion, is recoverable as a loss by perils of the sea. It is curious that, so far as their Lordships know, there is no express decision on this point under a policy of marine insurance. But, in their Lordships' judgment, the question should be answered in the affirmative, as they think the jury did. The answer may be based on the view that where the weather conditions so require, the closing of the ventilators is not to be regarded as a separate or independent cause, interposed between the peril of the sea and the damage, but as being such a mere matter of routine seamanship necessitated by the peril that the damage can be regarded as the direct result of the peril. In *The Thrunscoe* (2), where a cargo of oats and maize had been damaged by the closing of the ventilators owing to heavy weather, it was held that the damage was caused by perils of the sea. The severity of the weather (there referred to as exceptional, though the adjective is immaterial) was described by Jeune P. as the proximate cause of the damage because the closing of the ventilators was due to that cause, and Gorell Barnes J. described it as the direct cause. It is true that the case dealt with the exceptions in the bill of lading, to which the doctrine of causa proxima does not apply in the same way as in insurance law. But it is now established by such authorities as *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1), and many others, that causa proxima in insurance law does not necessarily mean the cause last in time, but what is " in substance " the cause, per Lord Finlay (2), or the cause " to be determined by "common-sense principles," per Lord Dunedin. (3) The same rule has been reiterated by the House of Lords several times since then, most strikingly, perhaps, in *P. Samuel & Co.* v. *Dumas* (4), where it was held by a majority of the Lords that where a ship insured by the mortgagee was lost by being scuttled by the deliberate act or procurement of the mortgagor, it was not in insurance law to be deemed a loss by perils of the sea. The proximate cause was the intentional and fraudulent act which let in the sea water and sank the vessel. In cases of fire insurance it has been said that loss caused from an apparently necessary and bona fide attempt to put out a fire, by spoiling goods by water, and in other ways, is within the policy, per Kelly C.B. in *Stanley* v. *Western Insurance Co.* (5) Their Lordships agree with this expression of opinion, and accordingly are prepared to hold that the damage to the rice, which the jury have found to be due to action necessarily and reasonably taken to prevent the peril of the sea affecting the goods, is a loss due to the peril of the sea and is recoverable as such.

---

(1) [1921] 1 A. C. 615, 630.

(2) [1897] P. 301.

The same result may be reached by a somewhat different approach. It may be held that though such a loss is not strictly recoverable as a loss by perils of the sea, it is within the general words " all other perils losses and misfortunes," etc., which are contained in the policy, and have been quoted above. It is true that these general words have to be construed as restricted to cases akin to or resembling, or of the same kind as, those specially mentioned (per Lord Macnaghten) in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser*

(1) [1918] A. C. 350.
(2) Ibid. 355.
(3) Ibid. 362.
(4) [1924] A. C. 431.
(5) (1868) L. R. 3 Ex. 71, 74.

J. C.
1940
CANADA RICE MILLS, LD.
v.
UNION MARINE AND GENERAL INSURANCE CO.

& Co. (1), where they were held not to cover the loss claimed, but subject to that limitation, they may be used to give some extension to the specific perils, such as perils of the sea. Thus in *Butler* v. *Wildman* (2), a master of a ship, in order to prevent a quantity of dollars falling into the hands of the enemy, by whom he was about to be attacked, threw them into the sea, and was immediately afterwards captured. It was held that the loss came within the general words of the policy, if it did not fall strictly within the specific words, "jettison" or "enemies." The general words had the effect of "including all losses which are the consequences of justifiable "acts done under the certain expectation of capture or "destruction by enemies," per Best J. (3) The same principle was applied by Gorell Barnes J. in *The Knight of St. Michael* (4), where a cargo of coal had become so heated that the vessel was compelled to put into a port of refuge, and a large portion of the cargo was discharged and sold, entailing a loss of freight. No fire had actually broken out. Gorell Barnes J. held that the loss was recoverable if not as a loss by fire, as a loss ejusdem generis, and covered by the general words.

It is obvious that in these two cases there was no question of turning away to avoid a future peril. If there had been, the loss might properly have been held to be due not to the peril, but to deliberate action to avoid coming into the area of the peril, as in *Becker, Gray & Co.* v. *London Assurance Corporation* (5) and similar cases. But in *Butler* v. *Wildman* (2) and *The Knight of St. Michael* (4) the subject of the insurance was actually in the grip of the peril, enemies in the one case, fire in the other. The correctness of these authorities has not been doubted, and their Lordships think they were rightly decided. Indeed, in *Becker, Gray & Co.'s* case (5) Lord Sumner expressly cites with approval *The Knight of St. Michael* (4) as a decision on the general words in the policy, and distinguishes it from the case then before him.

(1) 12 App. Cas. 484, 501.
(2) 3 B. & Ald. 398.
(3) Ibid. 407.
(4) [1898] P. 30.
(5) [1918] A. C. 101, 118.

J. C.
1940
CANADA RICE MILLS, LD.
v.
UNION MARINE AND GENERAL INSURANCE CO.

Similarly in the present case there was an actually operating peril of the sea. There was accordingly a loss either by perils of the sea or a loss within the general words.

In their Lordships' judgment no ground has been shown for setting aside the verdict of the jury, and the appeal should be allowed, and the judgment of the Supreme Court restored. The respondents will pay to the appellants their costs of this appeal and in the Courts below.

They will humbly so advise His Majesty.

Solicitors for appellants : *Charles Russell & Co.*
Solicitors for respondents : *Gard, Lyell & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* EAST SUFFOLK RIVERS CATCHMENT BOARD . . . . . . APPELLANTS;

1940

June 6, 10, 11, 12, 13, 17, 18, 19, 20, 25, 26; *Dec.* 9.

AND

KENT AND ANOTHER . . . . . RESPONDENTS.

Water—Land drainage—Breach in wall on bank of tidal river—Damage to adjoining pasture land by flooding—Catchment Board empowered but not obliged to repair breach—Repair undertaken but unnecessary delay in performance—Corresponding increase of damage to land—Liability of Board to landowner—Land Drainage Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *ss.* 34, 81.

Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise the power. If in the exercise of its discretion the authority embarks upon an execution of the power, the only duty owed to any member of the public is not thereby to add to the damages which that person would have suffered had the authority done nothing. So long as the authority exercises its discretion honestly, it can determine the method by which, and the time during which, the power shall be exercised; and it cannot be made liable, except to the extent just mentioned, for any damage that would have been avoided if it had exercised its discretion in a more reasonable way.

Owing to a very high tide a breach was made in a sea wall, as a consequence of which the respondents' land was flooded. The appellants in the exercise of their statutory powers undertook the repair of the wall, but carried out the work so inefficiently that the flooding continued for one hundred and seventy-eight days, thereby causing serious damage to the respondents' pasture land. It appeared from the evidence that by the exercise of reasonable skill the breach in the wall might have been repaired in fourteen days:—

Held (Lord Atkin dissenting), that the appellants being under no obligation to repair the wall or to complete the work after having begun it, were under no liability to the respondents, the damage suffered by them being due to natural causes.

Decision of the Court of Appeal [1940] 1 K. B. 319 reversed.

APPEAL from a decision of the Court of Appeal (1) affirming a judgment of Hilbery J.

The plaintiff, Henry Kent, was the occupier, and the plaintiff, Richard George Porter, was the freeholder, of a dairy farm and premises known as Hemley Hall, in the county of Suffolk. About fifty acres of marshland which formed the greater part of the pasturage of the farm lay adjacent to the tidal part of the river Deben. Between that marshland and the river there had existed for a number of years a wall which was a necessary protection to keep the incoming tides when they rose above a certain height from coming upon the land.

---

* *Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD ROMER, and LORD PORTER.

(1) [1940] 1 K. B. 319.

The defendants, the East Suffolk Rivers Catchment Board, were constituted under the Land Drainage Act, 1930, with all the powers vested in such boards by the Act, and the river Deben was in their area.

On December 1, 1936, owing to the coincidence of a spring tide and a northerly gale, the water of the river rose to an unusually high level; with the result that it made a breach in the protecting wall of some 25 feet in length and inundated the plaintiffs' adjoining pasture land. The plaintiffs immediately brought the occurrence to the notice of the defendants, and on December 2, 1936, Mr. T. C. Clark, a surveyor of the defendants, along with his assistant, Mr. Abbott, and a Mr. Studd, who had previously been in the defendants' employ, on behalf of the defendants, decided to undertake the work of closing the breach in the wall in order to prevent the tides from further flooding the said land.

The method they first adopted was that of driving a dam straight across the breach. This method was tried three times—in December, 1936, and in January and February, 1937, but without success. It was interfered with to some extent because of the existence in the sill of the breach of a large hole which had been caused by the action of the tidal water and became larger in the course of the operations, and also because the men employed on the work were too few in number and wanting in skill, and the materials were inadequate. One result of this method was that a large quantity of the material used in stopping the breach, consisting of bags of clay and piles, was washed out of it and scattered over two and a half acres of the plaintiffs' land. Mr. Clark and his assistants then adopted an alternative method, namely, making on the saltings between the wall and the river a semi-circular dam passing from the wall on one sill of the breach to the wall on the other side of it, so as to exclude the tides from the breach, and to enable the hole in the sill to be filled up and a continuous foundation provided for the new wall; and they at the same time employed a larger number of men more skilled in the work.

On May 28, 1937, as a result of using that alternative method, the defendant's employees at length succeeded in closing the breach, after having been continuously engaged upon the work in one way or another for 178 days.

The plaintiffs brought this action against the defendants alleging that on the river wall breaking down and the plaintiffs' land becoming flooded, the defendants, as was their duty, began to repair the wall, but in breach of their duty to do the same sufficiently and with the utmost expedition possible, they took no steps so to repair the wall, and failed and neglected to see that sufficient labour was employed or continuously employed or that proper or any supervision was given thereto or that proper or any adequate methods were adopted to mend the breach in the wall and clear the land of water within a reasonable time, or at all, in consequence whereof the flooding continued for many months, and that by reason thereof the land had been or would be rendered valueless to the plaintiff Porter, and the plaintiff Kent's cows and milk were depreciated in value; and the plaintiffs claimed a declaration that the defendants were liable to compensate the plaintiffs for their loss and injury, an inquiry as to the amount and payment of same when ascertained.

The defendants pleaded (inter alia) that at no time did they owe any duty to the plaintiff to keep the river wall in repair; they denied any negligence; and maintained that the plaintiffs had no cause of action for damages in respect of such matters.

At the trial Hilbery J. allowed an amendment of the statement of claim by the addition thereto of an allegation that the defendants negligently adopted at the outset a method or system of work for closing the breach which was unskilful and negligent inasmuch as in the circumstances it could not have succeeded within a reasonable time, whereas there was available an alternative method which would have succeeded in a reasonable time and would have prevented most, if not all, of the damage which actually occurred to the plaintiffs.

Hilbery J. came expressly or in effect to the following findings of fact: that the direct method of stopping the breach in the wall by a dam thrown across the breach was not a reasonably skilful method, and that the alternative method of a dam on the saltings was the only effective method; that the defendants could have employed all along a larger number of men and more skilled men and more adequate materials; that if the alternative method had been adopted from the first with a sufficiency of skilled men and materials the breach in the wall might have been closed in fourteen days instead of the one hundred and seventy-eight days actually taken; that on each of the days on which the work lasted beyond fourteen days the defendants had in fact inflicted upon the plaintiffs fresh damage and injury by flooding. He also found that the direct method had caused the plaintiffs further injury by increasing the size of the hole in the sill, which would have to be filled in at their expense, and by causing the said refuse to be scattered over their land, but no claim was made nor was any relief given in respect of this damage. The only claim made was for damage caused by the continuance of the flooding.

Hilbery J. in giving judgment said that the decided cases supported the view that the plaintiffs had a cause of action against the defendants on the ground that what they did was done without reasonable skill or care to safeguard the plaintiffs. If the defendants had done nothing they could not have been compelled to repair the wall, but as they had embarked upon the work, a duty arose on their part to exercise reasonable care in doing the work so as not to injure the plaintiffs whereas in fact they had failed in that duty. It was not a mere case of non-feasance by the defendants, or failure to exercise their powers; it was a case of the negligent exercise of their powers and one of the results was undue delay before the breach in the wall was closed. He accordingly gave judgment for the plaintiffs not for a declaration, but for such sum as would be found due to them as representing the damage suffered in consequence of the defendants' misfeasance.

On appeal it was held by Slesser and MacKinnon L.JJ. (du Parcq L.J. dissenting) that though the defendants were under no duty to exercise the powers conferred upon them by the Act of repairing the wall, yet, having chosen to exercise these powers, they were under a duty to exercise them with such care, skill and expedition, that no one would be injured thereby, that there had been a failure on their part to perform that duty and consequently they were liable for the damage thereby occasioned to the plaintiffs.

The defendants appealed.

Beyfus K.C. and *F. W. Beney* for the appellants. If the appellants were under any duty in this matter the question is, to what extent ? We submit that the appellants are not liable for the damage alleged to have been caused by the insufficient exercise of their powers. If, for example, a public authority having the power to light a town, lights it insufficiently and, in consequence, some one is injured, the authority is not liable. Where an authority having power to do something exercises that power for the purpose of conferring a benefit, the authority is not liable either for delay in exercising its powers or for the insufficiency of the benefit, even though the insufficiency or delay may be due to the unreasonable methods adopted, or for the lack of reasonable care. Here the appellants were seeking to confer a benefit, and the respondents cannot complain if the appellants took too long as was said in carrying out the work. In *Sheppard* v. *Glossop Corporation* (1) Atkin L.J. said (2) : " If a local authority having statutory powers "decides to exercise those powers, it is under a duty to persons "interested to take reasonable care not to cause damage, so "far as the avoidance of damage is consistent with the exercise "of the statutory powers. But it is under no legal duty to "act reasonably in deciding whether it shall exercise its "statutory powers or not, or in deciding to what extent,

---

(1) [1921] 3 K. B. 132.

(2) Ibid. 150.

H. L. (E.)
1940
East Suffolk Rivers Catchment Board
v.
Kent.

"over what particular area, or for what particular time, it "shall exercise its powers. If it decides to light any area, "its lamps and appliances must be placed and maintained "with reasonable care so as to avoid danger to wayfarers or "owners or occupiers of adjoining property. If gas or electricity "is conducted to the lamps, care must be taken to prevent "the gas or electricity from escaping so as to cause damage. "There is no duty to exercise the power of lighting at all." That correctly states the limit of liability. No doubt the appellants had to take reasonable care not actively to inflict damage; their duty, in carrying out the work was merely not to inflict damage. Sect. 6, sub-s. 1, of the Act cannot affect the right which the owner of land possesses to clean out his own ditches: *Geddis* v. *Proprietors of Bann Reservoir* (1). What was done here was the equivalent of what was done there. If one is exercising his powers, he is not to inflict damage upon others. It was, of course, open to Parliament to impose a duty on the Board to abate damage, but Parliament has not done so. Lord Blackburn there said (2): "For I take it, without citing "cases, that it is now thoroughly well established that no "action will lie for doing that which the Legislature has "authorised, if it be done without negligence, although it "does occasion damage to any one; but an action does lie "for doing that which the Legislature has authorised, if it "be done negligently." In *Sheppard* v. *Glossop Corporation* (3) it was decided that s. 161 of the Public Health Act, 1875, confers upon local authorities a discretion, but imposes on them no obligation to light the streets in their district; consequently, that the local authority which had begun were not bound to continue to light the street; and that having done nothing to make the street dangerous they were under no obligation, by lighting or otherwise, to give warning of danger. In this case the appellants were under no positive duty to the respondents; our duty was this only, not actually to cause them damage; as to the latter duty see *Dawson & Co.* v. *Bingley Urban District Council* (4). That case, we submit, illustrates the correct legal proposition. If doing the work slowly does not put the respondents in a worse position, we commit no breach of duty owing to them. Moreover, with the limited resources at our disposal, and a part-time surveyor, we did our best to cope with the danger. Regard must be had to the staff and appliances available.

---

(1) (1878) 3 App. Cas. 430.
(2) Ibid. 455.
(3) [1921] 3 K. B. 132.
(4) [1911] 2 K. B. 149.

Russell Vick K.C. and *Robert Fortune* for the respondents. Throughout this litigation the appellants have said they were never under a duty to us. In *Gilbert* v. *Trinity House Corporation* (1) Day J. said (2), " whosoever undertakes the "performance of, or is bound to perform, duties—whether they "are duties imposed by reason of the possession of property, "or by the assumption of an office, or however they may "arise—is liable for injuries caused by his negligent discharge "of those duties. It matters not whether he makes money "or a profit by means of discharging the duties, or whether "it be a corporation or an individual who has undertaken to "discharge them. It is also immaterial whether the person "is guilty of negligence by himself or by his servants." Here the appellants undertook the duty of dealing with the emergency ; they started with quite insufficient men and apparatus ; and their work was ineffective. A volunteer cannot be heard to say that he can limit the extent of his voluntary duty ; he must act reasonably. The appellants should have done nothing at all, or should have contracted with competent persons to do the work. The river being tidal, the question of time for carrying out the necessary repairs was all-important inasmuch as damage was occurring each tide. This has to be borne in mind. Much of the damage was in fact due to the delay in effecting the repairs. In *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (3) Blackburn J. in stating the law on the subject pointed out that though the Legislature has authorized the execution of works, it does not thereby exempt those so authorized from the obligation to use reasonable care to avoid causing damage. Unnecessary damage may be done if the necessary work is not carried out with skill and

(1) (1886) 17 Q. B. D. 795.

(2) Ibid. 799.

(3) (1866) L. R. 1 H. L. 93.

H. L. (E.)

1940

EAST SUFFOLK RIVERS CATCHMENT BOARD *v.* KENT.

diligence. In *Geddis* v. *Proprietors of Bann Reservoir* (1) it appeared that the persons incorporated under a local Act erected a reservoir, collected the waters of different streams, sent them through a certain channel, but after a time neglected to cleanse that channel, in consequence of which the water overflowed its banks and damaged the adjoining lands. It was held that the incorporated persons were under an obligation to take care that the due execution of the works and operations intended by the statute should not be injurious to the adjoining lands. In that case Lord Hatherley said this (2): "I apprehend that the true construction of all such powers "given to companies is this: You *may* carry out your work "to its full extent, and in some cases you *must* carry it out "to its fullest extent, in the manner provided by the Act, "but in so doing you shall not create any needless injury— "you shall use all those precautions against injury to others "which you would use against injury to yourselves in carrying "on a similar work, and if we find that in carrying out your "powers damage has been done by you, the law will say that "the powers which you can exercise shall be exercised for the "prevention of mischief." In the same case Lord Blackburn said (3): "I take it, without citing cases, that it is now "thoroughly well established that no action will lie for doing "that which the Legislature has authorised, if it be done "without negligence, although it does occasion damage to "any one; but an action does lie for doing that which the "Legislature has authorised, if it be done negligently"; see also *Gilbert* v. *Trinity House Corporation* (4); *McClelland* v. *Manchester Corporation* (5); *Sheppard* v. *Glossop Corporation* (6).

The House took time for consideration.

1940. Dec. 9. VISCOUNT SIMON L.C. My Lords, on December 1, 1936, there was an exceptionally high spring tide on

---

(1) 3 App. Cas. 430.
(2) Ibid. 450.
(3) Ibid. 455.
(4) 17 Q. B. D. 795.
(5) [1912] 1 K. B. 118.
(6) [1921] 3 K. B. 132.

H. L. (E.)
1940
EAST SUFFOLK RIVERS CATCHMENT BOARD
v.
KENT.

Viscount Simon L.C.

the coast of Suffolk and this, reinforced by the influence of a northerly gale, caused the waters of the River Deben (which is tidal below Woodbridge) to rise so high as to wash over and break through in many places the ancient walls or banks, made of clay and stone, which ordinarily prevent the flooding of the adjoining marshland. The marshland inside the walls is at a lower level than ordinary high tides, and consequently if a breach is made in the walls the tidal water which enters will keep the marsh pastures flooded until the gap in the wall has been stopped, and the invading water has been drained away. There were no less than twenty-two breaches caused by this high tide in the walls of the River Deben alone, with the result that very extensive flooding took place. One of the most serious floodings occurred through a breach, estimated to measure twenty or thirty feet across, in the wall which guarded the marsh pastures of a farm belonging to the respondent Porter, of which the respondent Kent was the occupier. Some fifty acres of these pastures became and continued thus flooded.

The appellants are the Catchment Board, constituted under the Land Drainage Act, 1930, for the main rivers of East Suffolk, and the River Deben is one of these. By s. 6 of the Act the Catchment Board exercises the powers conferred by the Act on drainage boards, so far as concerns the main rivers, including the banks thereof, and drainage works in connection with the main rivers. These powers, by s. 34, sub-s. 1 (*a*), include the power to repair any existing water course or drainage work, and the interpretation section (s. 81) makes it plain that this includes the repair of such walls or banks as guarded the respondents' farm until they were broken through. The statement of claim contained the allegation that the appellants were under a duty to keep the respondent's walls in efficient condition and, if a breach occurred, were under a duty "efficiently and with the utmost expedition" to repair any breach. This contention was, however, rejected by Hilbery J. who tried the case, and in taking this view, which is plainly right, the learned judge was following and approving previous decisions by du Parcq J. (as he then was) in the case of *Smith* v.

Cawdle Fen, Ely (Cambridge) Commissioners (1), and Stable J. in *Gillett* v. *Kent Rivers Catchment Board* (2). Before the Court of Appeal, the respondents no longer contended that the Land Drainage Act imposed on the appellants a positive duty to intervene and undertake the repair of any breach, and the argument there and before this House has proceeded on the basis that the appellants had statutory power to intervene, but were not under a duty to do so which could be enforced by action. It is to be noted, however, that under s. 12 a Catchment Board which fails to exercise its powers may, in certain circumstances, be directed by the Minister of Agriculture and Fisheries with respect to the performance of its statutory functions.

If, therefore, the appellant Board had remained entirely passive, it is agreed that the respondents could not have succeeded in any action against them for non-feasance. But the appellants did not remain inactive, but endeavoured to deal with all the breaches that had taken place in their area, amounting to about thirty in number, including the serious breach in the wall skirting the respondents' land. In the other cases on the River Deben the appellants seem to have been successful, but Hilbery J. has found, and, following the Court of Appeal, I am prepared to accept the learned judge's finding on the facts, that the methods adopted and the staff employed in trying to repair the damage to the wall, with which we are concerned in this case, were so inefficient that, whereas the gap could, by the exercise of reasonable skill, have been closed and the flooding arrested in fourteen days, this result was not in fact attained till after the lapse of one hundred and sixty-four days. In the meantime, of course, the marsh pastures remained covered by salt water and the respondents continued to suffer the damage which had been initiated by the breach in the wall. For the purpose of deciding the difficult and important issue of principle which now arises, details as to the appellants' unsuccessful efforts do not matter, but it is convenient to state that it was only at the third attempt that the gap was successfully filled, and

(1) [1938] 4 All E. R. 64.

(2) [1938] 4 All E. R. 810, 813.

that in the view of the learned judge, who had a body of expert evidence before him, the earlier efforts of the appellants, which consisted in attempting to build straight across the gap instead of building a semi-circular bastion out into the saltings and then reconstructing the wall behind this protection, had only the remotest possibility of success, and caused the delay.

The problem of law which now arises for solution is by no means an easy one. Its essential elements are these. (1.) The appellant Board were under no statutory duty to repair the breach, but they had the power to enter upon the land for the purpose of endeavouring to effect such repair and they did so enter. (2.) It was the original breach in the wall, caused by the act of nature, which produced the flooding of the respondents' land and it was the operations of the tide which kept it flooded; the efforts of the appellants were directed to abating this damage. The appellants' want of skill did not cause such damage at all. (3.) If the appellants had not shown such want of skill in trying to repair the wall, and if they had been served by an adequate well-trained staff, the gap in the wall would have been closed much sooner than it was and the flooding would have been more promptly abated.

The question is whether, in the above circumstances, the appellants are liable to the respondents in damages to such amount as would represent the net loss to the respondents due to the delay in abating the flood. The Court of Appeal were divided on this issue. Slesser L.J. and MacKinnon L.J. thought that the appellants were liable as for breach of duty to do their work with reasonable care and expedition. du Parcq L.J. differed and held that the appellant Board was "not "liable for damage suffered through failure to exercise its "powers adequately or at all, even though the damage might "have been averted or lessened by the exercise of reasonable "care and skill."

It is not, of course, disputed that if the appellants, in the course of exercising their statutory powers, had inflicted fresh injury on the respondents through lack of care or skill, they would be liable in damages for the consequences of their negligent act. If, for example, the appellants, by their unskilful proceedings had caused a further area of the respondents' land to be flooded, or had prolonged the period of flooding beyond what it would have been if they had never interfered, they would be liable. But (apart from two minor matters, which it is agreed do not govern the main issue) nothing of this sort happened. The respondents would have gained if the flooding had been stopped sooner; their complaint against the appellants is that they did not act with sufficient skill to stop it more promptly; but the respondents cannot point to any injury inflicted upon them by the appellant Board, unless it be the Board's want of success in endeavouring to stop the flooding at an earlier date.

In order that the respondents should succeed in this action, it is necessary that they should establish, not only that the appellants were wanting in care and skill when exercising their statutory powers, but that they inflicted injury and loss upon the respondents by their negligence. Lord Parker thus states the proposition in *Great Central Ry.* v. *Hewlett* (1): "It is undoubtedly a well-settled principle of law that when "statutory powers are conferred, they must be exercised with "reasonable care, so that if those who exercise them could by "reasonable precaution have prevented an injury which has been "occasioned, and was likely to be occasioned, by their exercise, "damage for negligence may be recovered." In the present case the damage done by the flooding was not due to the exercise of the appellants' statutory powers at all. It was due to the forces of nature which the appellants, albeit unskilfully, were endeavouring to counteract. Supposing, for example, that after the appellants had made their first unsuccessful attempt they had decided to abandon their efforts altogether, the respondents could have had no legal claim against them for withdrawing, even though the result might have been to leave the respondents' land indefinitely flooded. This shows, I think, how different is the relation between the Catchment Board and individual owners or occupiers like the respondents, and the relation between a contractor employed by the respondents to mend the wall. In the latter case the respondents would have a remedy in damages if the contractor did not exercise reasonable skill and promptness in discharging his task and if damage resulted. But in the former case the Catchment Board has its responsibilities over the whole of its area to consider; it may be that in its judgment it is necessary to use its skilled staff in mending other breaches; it may be that the outlay involved in making a good job of one particular repair is more than its limited finances would permit. Part IV. of the Land Drainage Act contains financial provisions. Without setting these out at length, it is sufficient to say that the expenses of the Catchment Board are met by the issue of precepts to the County Council and, it may be, to certain other local bodies, but that the statute puts limits to the amounts thus raised. du Parcq L.J. in his dissenting judgment, points out that when Parliament has left it to the public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, this may raise " a question involving the consideration "of matters of policy and sometimes the striking of a just "balance between the rival claims of efficiency and thrift."

---

(1) [1916] 2 A. C. 511, 519.

Reference was made during the argument, as was natural, to the well known words of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (1): " I take it, without citing "cases, that it is now thoroughly well established that no action "will lie for doing that which the Legislature has authorised, "if it be done without negligence, although it does occasion "damage to anyone; but an action does lie for doing that "which the Legislature has authorised, if it be done negli-"gently." Lord Blackburn would certainly not wish to be understood as saying that such an action would lie in the absence of proof that the defendant's negligence caused damage; indeed, negligence in such a connection involves the twofold conception of want of care on the part of the defendant and the consequential infliction of loss upon the plaintiff. As Lord Reading C.J. observed in *Munday* v. *London County Council* (2): " Negligence alone does not give a cause of "action; damage alone does not give a cause of action;

---

(1) 3 App. Cas. 430, 455.

(2) [1916] 2 K. B. 331, 334.

H. L. (E.)
1940
EAST SUFFOLK RIVERS CATCHMENT BOARD
v.
KENT.

Viscount Simon L.C.

"the two must co-exist." A third essential factor is the existence of the particular duty. As Lord Wright expressed it in *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1), "In strict "legal analysis, negligence means more than heedless or "careless conduct, whether in omission or commission: it "properly connotes the complex concept of duty, breach, and "damage thereby suffered by the person to whom the duty was "owing."

Moreover, as Scrutton L.J. has pointed out in *Sheppard* v. *Glossop Corporation* (2) Lord Blackburn's passage must be read in the context in which it was pronounced. I agree with du Parcq L.J. that it would be misapplied if it were supposed to support the proposition that a public body, which owes no duty to render any service, may become liable at the suit of an individual, if once it takes it upon itself to render some service, for failing to render reasonably adequate and efficient service. On the other hand, if the public body by its unskilful intervention created new dangers or traps, it would be liable for its negligence to those who suffered thereby. Scrutton L.J. in *Sheppard* v. *Glossop Corporation* (2) has a passage which makes the same distinction. That case was concerned with a local authority upon which Parliament had conferred a discretionary power of lighting. "If they do "light," said the learned Lord Justice, "they will be liable "in damages for negligence in lighting; negligence in allowing "gas or electricity to escape; negligence in putting posts in "a highway without warning; and negligence in placing traps "and dangers in the streets and not lighting them at night. But "they are not liable merely because in the exercise of their "discretion they do not light, or because they discontinue "lighting, [for] dangers which they have not themselves "created."

These considerations lead to the conclusion that the respondents' claim is ill-founded. They have suffered damage by the flooding of their land during four months or more. They seek to recover compensation from the appellants for all of this loss except the first fortnight. But the appellants did

---

(1) [1934] A. C. 1, 25.

(2) [1921] 3 K. B. 132, 149.

H. L. (E.)
1940
East Suffolk Rivers Catchment Board v. Kent.
Viscount Simon L.C.

not cause the loss; it was caused by the operations of nature which the appellants were endeavouring, not very successfully, to counteract. It is admitted that the respondents would have no claim if the appellants had never intervened at all. In my opinion, the respondents equally have no claim when the appellants do intervene, save in respect of such damage as flows from their intervention and as might have been avoided if their intervention had been more skilfully conducted.

In my opinion, therefore, the appeal should be allowed.

Lord Atkin (read by Lord Porter). My Lords, two material points emerged on the argument of this appeal: (1.) Was there a duty owed to the plaintiffs and, if so, what was its nature? (2.) If there was a duty owed to the plaintiffs to conduct the work with reasonable dispatch, was there any damage caused to the plaintiffs by the breach of the duty?

On the first point I cannot help thinking that the argument did not sufficiently distinguish between two kinds of duties: (1.) A statutory duty to do or abstain from doing something. (2.) A common law duty to conduct yourself with reasonable care so as not to injure persons liable to be affected by your conduct.

(1.) The duty imposed by statute is primarily a duty owed to the State. Occasionally penalties are imposed by the statute for breach; and, speaking generally, in the absence of special sanctions imposed by the statute the breach of duty amounts to a common law misdemeanour. The duty is not necessarily a duty owed to a private citizen. The duty may, however, be imposed for the protection of particular citizens or class of citizens, in which case a person of the protected class can sue for injury to him due to the breach. The cases as to breach of the Factory or Coal Mines Act are instances. As a rule the statutory duty involves the notion of taking care not to injure and in such cases actions for breach of statutory duty come within the category of negligence: see *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1).

(2.) But apart from the existence of a public duty to the public, every person whether discharging a public duty or not is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care. This duty exists whether a person is performing a public duty, or merely exercising a power which he possesses either under statutory authority or in pursuance of his ordinary rights as a citizen. To whom the obligation is owed is, as I see it, the principal question in the present case.

---

(1) [1934] A. C. 1.

Of the existence of the duty and the nature of it in the case of statutory duties or powers there is abundant authority, most of which was cited. I do not propose to discuss the cases but will mention *Boulton* v. *Crowther* (1), trustees acting under Turnpike Act authority. There Abbott C.J. said: "If in doing the act they acted arbitrarily, carelessly or oppressively, the law in my opinion has provided a remedy." In *Southampton and Itchin Floating Bridge Co.* v. *Local Board of Health of Southampton* (2) a demurrer was overruled to the declaration which alleged that the defendants conducted themselves so wrongfully, improperly and negligently and with such want of due and proper care as to injure the plaintiffs. In *Whitehouse* v. *Fellowes* (3) (another case of negligence by trustees under a Turnpike Act), Williams J. said, "It may be observed "that the act I have supposed to be done by the trustees "is one which must necessarily produce damage whether "done carefully or not: but the qualification put in the case is "this, that if the act authorised to be done by the trustees is "done so carelessly or improperly that the careless or improper "manner in which it is done either creates or increases the "damage, the trustees will be liable": *Mersey Docks Trustees* v. *Gibbs* (4). *Geddis* v. *Proprietors of Bann Reservoir* (5), "An action "does lie for doing that which the legislature has authorised if "it be done negligently" per Lord Blackburn (6) with the prelude "that it is now thoroughly well established." *Milward* v. *Redditch Local Board* (7), "no right to make improvements

---

(1) (1824) 2 B. & C. 703, 707.
(2) (1858) 8 E. & B. 801.
(3) (1861) 10 C. B. N. S. 765, 780.
(4) L. R. 1 H. L. 93.
(5) 3 App. Cas. 430.
(6) Ibid. 456.
(7) (1873) 21 W. R. 429.

"in a way calculated to cause unnecessary injury to the plaintiff." To this principle there is however one qualification which is well settled and indeed is admitted by the defendants that in carrying out works authorized by statute you must not act negligently. *Roberts* v. *Charing Cross, etc., Ry. Co.* (1) (railway company restrained from working by night so as to disturb plaintiff) "must not act unreasonably, arbitrarily, "wantonly or offensively." *East Fremantle Corporation* v. *Annois* (2) where Lord Macnaghten accepts Abbott C.J.'s statement in *Boulton* v. *Crowther* (3); *Howard-Flanders* v. *Maldon Corporation* (4), where Scrutton L.J. (5) selects a passage from Collins L.J. in *Southwark and Vauxhall Water Co.* v. *Wandsworth Local Board* (6); "Merely an assertion of the "proposition so frequently affirmed that, where statutory "rights infringe upon what but for the statute would be the "rights of other persons, they must be exercised reasonably, "so as to do as little mischief as possible." Finally I would refer to *Sheppard* v. *Glossop Corporation* (7), where the decision was based upon an acceptance of the proposition that an undertaker is liable if he exercises a power negligently: but is not liable for refusing to exercise the power though it might be reasonable to do so. I was a party to that decision, and will not cite any remarks of Bankes L.J. or myself but will refer to words taken from Scrutton L.J. (8): "But it is going "far beyond Lord Blackburn's dictum to say that because, when "an option is given by statute to an authority to do or not to "do a thing and it elects to do the thing and does it negligently, "it is liable, therefore it is liable if it elects not to do the thing, "which by the statute it is not bound to do at all."

I treat it therefore as established that [a public authority whether doing an act which it is its duty to do, or doing an act which it is merely empowered to do, must in doing the act do it without negligence, or as it is put in some of the cases must not do it carelessly or improperly.] Now quite apart from a duty owed to a particular individual which is the question in this case I suggest that it would be difficult to lay down that a duty upon a public authority to act without negligence or not carelessly or improperly does not include a duty to act with reasonable diligence by which I mean reasonable dispatch. I cannot imagine this House affording its support to a proposition so opposed to public interests where there are so many public bodies exercising statutory powers and employing public money upon them. I myself have been unable to think of any case where a duty to perform a continuous operation with reasonable care, i.e. without negligence, does not involve an obligation to perform it with reasonable dispatch. Of course what is reasonable means reasonable in all the circumstances of the particular case.

---

(1) (1903) 87 L. T. 732.
(2) [1902] A. C. 213.
(3) 2 B. & C. 703, 707.
(4) (1926) 135 L. T. 6.
(5) 135 L. T. 6, 11.
(6) [1898] 2 Ch. 603, 611.
(7) [1921] 3 K. B. 132.
(8) Ibid. 145, 146.

I thus come to the crucial point in this case to whom is such a duty owed, or who can complain of the failure to use reasonable dispatch. Now it must be conceded that instances will occur of the performance of powers where it might be difficult for a member of the public generally to complain of unreasonable delay. For instance delay in the work of relaying the surface of a highway may not be actionable at the suit of members of the public who are put to expense and inconvenience by having to make a detour. Even in this case I think something might be said for a householder or shopkeeper on the route under repair who is for an unreasonably long time deprived of access to his premises for himself and his customers. But we have to deal here with relations between the plaintiffs and the Board which I suggest are much closer than the general relations of members of the public to a public authority. The Board were engaging themselves in repairing the plaintiffs' wall with the object of preventing the further flooding of the land of the plaintiffs and, I think, also one other occupier, and they were operating upon the plaintiffs' land. Subject to what I have to say upon the causation of damage which I wish for the present purpose to assume, they would know that the longer the work was delayed the longer would the waters ebb and flow over the land with the possibility of damage therefrom. I consider that these relations give rise to a duty owed to the plaintiffs to use reasonable care, including dispatch in doing the work. Indeed, over and over again the appellants' counsel admitted that if and so far as their work was conducted with such unreasonable delay as to deprive the plaintiffs of the use of their land owing to occupation by the Board's workmen or materials there would be a good claim for damage. This admits a duty owed to the plaintiffs in respect of dispatch and this controversy is confined to the extent of the duty and the injury caused by it. It is in respect of this use of the plaintiffs' land that the question as to the power of the plaintiffs to do the work themselves becomes at all relevant. I feel sure that the reference to this in Slesser L.J.'s judgment was misunderstood in the appellants' argument. It is not that the Board owed a duty to the plaintiffs because the plaintiffs could have done the work themselves. I think that the argument is that the Board came upon the plaintiffs' land to do work which the plaintiffs could have done themselves, and that that circumstance indicates a relationship which supports a duty owed to the plaintiffs to do the work with reasonable dispatch. I do not wish to refer in detail to *Donoghue* v. *Stevenson* (1), but I venture to think that the principles there accepted by the majority of this House give guidance on this part of the case.

I now come to the second part of the case, namely, whether if there existed any duty owed by the Board to the plaintiffs to conduct the work with reasonable dispatch there was any damage caused by the breach.

I would begin by noting that there is in pleading no difference between actions of contract or tort as to the allegation of the cause of damage: "per quod" or as in Bullen and Leake "whereby" is the conventional averment that damage resulted from an infringement of a right of the plaintiff whether based on contract or tort. This merely illustrates the legal position. "The damage must be such as would flow from the breach of "duty in the ordinary and usual course of things. That is "the general rule both in contract and in tort, except that in "contract the law does not consider as too remote such damages "as were in the contemplation of the parties at the time when

---

(1) [1932] A. C. 562.

"the contract was made. Subject to that, only such damages "can be recovered as were immediately and naturally caused "by the breach." *Cobb* v. *Great Western Railway Co.* (1) cited by Lord Sumner in *Weld-Blundell* v. *Stephens* (2). The doubt that has arisen in the present case is whether the particular damage relied on by the plaintiffs was caused by the breach. The flood, it is said, broke down the plaintiffs' wall. The flow of water over their land was caused by the flood: the defendants were engaged in preventing similar damage from happening again to the plaintiffs; and nothing they did or omitted to do caused the damage complained of. I venture to think that this does not quite meet the plaintiffs' point. I understand them to say true it is that we cannot complain of the original flooding: and we must put up with the damage that resulted from the ebb and flow of the water over our lands for a certain time, namely, the time that would expire before our wall was repaired, when once you had begun to repair it, with reasonable dispatch—x days. But on the assumption now made you were under a duty to us to use reasonable dispatch and the water ebbed and flowed over our land for a far longer period, x + y days: and we have suffered damage from the presence of water for this x + y period greater than the damage we would have suffered from the x period alone. Now if the plaintiffs can prove this it seems inevitable that the extra damage is directly caused by the breach complained of. May I introduce a hypothetical case of a contractual duty, assuming as I do, that the causation of damage is the same in contract and tort. Assume that a shopkeeper had his roof injured in rainy weather so that the rain came in upon his goods: and that he contracted with a builder to repair it with an express term that work should proceed without unreasonable delay. If the builder were guilty of unreasonable delay whereby the rain beat upon the shopkeeper's goods for say fourteen days instead of four, would not the shopkeeper be able to recover such damages as he could show resulted from the excess exposure showing possibly that his goods could stand four days' exposure with

(1) [1893] 1 Q. B. 459; 62 L. J. (Q. B.) 335, 337. (2) [1920] A. C. 956, 979.

little damage but could not stand the extra ten. I think that this would be a plain case: and it would not depend upon an obligation to complete the work. The builder might be protected from an obligation to complete by subsequent conditions, death, strikes, war and the like, but for such damage as would be shown to be due to delay in the work while it was being performed I conceive he would clearly be liable. Such damage would be caused by the delay in repair, notwithstanding that the original cause of damage, the rain, and its continuance were in no way caused by the builder. I suggest therefore that if the plaintiffs could prove the case indicated above they should succeed. I appreciate that there is very slight evidence at present in support of this case, and I should not myself be prepared to accept the judge's suggestion, if that is what he really intended that each day after the end of fourteen days the flooding caused fresh damage. But it would obviously be impossible in a case where to avoid expense the parties had agreed not to try the question of damages at the hearing to dismiss a case for want of satisfactory proof of damage. I should be quite content to direct the judge to consider whether any damage at all of this kind was proved on the hearing of the damages issue, and if he found substantially none then to give judgment in the result for the defendants. I think the costs in such a case should probably be reserved. On the questions argued before us, however, I think that our decision should be for the plaintiffs.

LORD THANKERTON. My Lords, I have had the privilege of considering the opinions prepared by your Lordships, and, while I agree with the majority of your Lordships that the appeal should be allowed, I desire to state in my own way the principles and their application to the present case which have led me to that conclusion.

It is admitted that the Land Drainage Act, 1930, did not impose a positive duty to undertake the repair of breaches in the walls and banks of the main river on the appellants, but conferred on them power to undertake such repair, and to enter upon lands belonging to another for that purpose. It is clear to me that the appellants owed no duty to the respondents unless and until they actually entered on their land and commenced operations for repair of the breach. But I am equally clear that, as soon as they entered upon the land and commenced operations, the appellants owed a duty to the respondents to conduct such operations with such reasonable care as would avoid causing damage to the respondents' property, and that they would be liable to the respondents if the latter could show (*a*) absence of such reasonable care in the conduct of the operations, and (*b*) that they had suffered loss which was caused by such lack of reasonable care.

On the question of existence of a duty, it seems to me to be impossible to maintain that Parliament intended to authorize the appellants to cause damage to the respondents by want of ordinary care in their operations on the respondents' property. But I must make clear that, in my opinion, that duty only relates to the operations which they actually perform on the respondents' land. If the appellants chose to abandon the operations when only partially complete, they would be, in my opinion, entitled to do so, and would be under no liability to the respondents for such cessation, except in so far as the partially completed works might constitute a danger leading to damage. This is clearly stated by Scrutton L.J. in the *Glossop* case (1). This discretion as to abandonment of the operations is in marked distinction to the case of a positive statutory duty to undertake the repair, and the cases of a contractual undertaking to do the work.

The next question is as to the standard of care which will constitute responsible care. Your Lordships have had occasion recently to point out once more that the standard necessarily varies according to circumstances: *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (2). It does appear to me that there are special circumstances in the case of statutory bodies, such as the appellants, which should lead to the application of a somewhat less exacting standard than ordinarily prevails.

(1) [1921] 3 K. B. 132, 149.

(2) [1940] A. C. 152.

Lord Thankerton.

The actions of the waters, with whose depredations they are intended to deal, are uncertain and incalculable and the provision of staff, plant and material adequate to deal with sudden emergencies, let alone their somewhat cramped financial resources, present great difficulty, and, when you add the importance and the urgency of remedial measures, it does seem to me that much may be condoned as well-meant error of judgment, which under other circumstances might be considered as unjustifiably risky. I feel bound to make these observations for future guidance, although in the present case, keeping them fully in mind, I am unable to find that Hilbery J. was not entitled to hold that the appellants committed a breach of their duty to the respondents in adopting a method of repair which no reasonable man would have adopted. It was in this view that I have felt throughout that the only real question in this appeal relates to causation, and the difficulty arises from the fact that prior to the intervention of the appellants a source of damage had been already created by the action of the flood waters and that that source continued to be available—at least in some measure—until it was at long last excluded by the operations of the appellants. Now the point on which admittedly the success or failure of the appeal depends, is whether the failure of the appellants to close the breach sooner by an efficient method can be held as the causa causans of the damage which accrued during these extra days, to the exclusion of the flood breach as a cause of the damage. But it was in fact still the action of the water, rendered possible by the original breach, that caused the damage during these days, and failure to stop such action of the water cannot alter the fact that it is the water coming through the breach that causes the damage. I am accordingly of opinion that the respondents have failed to make a case sufficient to establish the essential link between the breach of duty found by the learned judge and the main damage of which they complain, and that the appeal should be allowed.

LORD ROMER. My Lords, the respondents by their statement of claim in the action alleged that after the river had

H. L. (E.)
1940
EAST SUFFOLK RIVERS CATCHMENT BOARD v. KENT.
Lord Romer.

broken through their wall the defendants "as was their duty" commenced to repair the said wall, but in breach of their duty failed to do the same efficiently and with the utmost expedition possible, in consequence of which breach of duty the flooding of the respondents' marshland continued for many months. The respondents in other words were contending that by virtue of the Land Drainage Act, 1930, the appellants had a duty and not merely a power to repair the wall in question. At the trial of the action this contention was rejected by Hilbery J., and neither in the Court of Appeal nor before this House was the decision of the learned judge upon this point in any way challenged. What, however, the respondents did contend was that, though not imposed upon the appellants by the Act, such a duty was nevertheless imposed upon them by the common law the moment that they began to exercise their statutory power of repairing the wall. It is not and cannot be said that the duty arose from any contract between the parties express or implied. Nor is it said that it can be treated as existing by an application of the law of estoppel. For there is no evidence that would justify a finding of the existence of any such contract or of any such estoppel. The duty is said to be imposed by the common law of England.

My Lords, it has been laid down time and again that, in exercising a power that has been conferred upon it, a statutory authority is under an obligation not thereby (i.e., by the exercise of the power) to inflict upon others any damage that may be avoided by reasonable care. But I know of no authority for the proposition that in selecting the time within which, the extent to which, and the method by which its statutory power is to be exercised it owes any duty whatsoever. There is, indeed, as I will point out later on, a decision of the Court of Appeal in England that is inconsistent with such a proposition. And yet this is the proposition that is involved in the respondents' contention in the present case. They allege, and for myself I think that they have proved, that the appellants, until they eventually embarked upon the construction of the V-shaped dam, selected a method of repairing the respondents' wall which, in view of the labour and materials at their disposal, was one that no reasonable man would have adopted. The result was that the sea water continued to flow through the breach in the wall and that the respondents' marshland continued to be flooded for a longer time than would have been the case had the appellants acted more reasonably; and I will assume that by reason of this the respondents suffered material damage. Now, had the Land Drainage Act, 1930, imposed upon the appellants the duty of repairing the wall instead of merely conferring upon them the power of doing so, they could without question have been made liable for this damage. For they would in that case have been under the obligation of effecting the repair with all reasonable skill and diligence, and they would have committed a breach of such obligation had there been any unreasonable delay in effecting the repair, whether such delay was due to an unreasonable time being taken in beginning the work or in the course of carrying it out or to their having adopted an unreasonable method of repair. But the Act imposed upon the appellants no duty of repairing the wall. It merely gave them the power of doing so. Whether or not they should exercise that power was a matter entirely within their own discretion unless and until the Minister of Agriculture intervened under s. 12 of the Act. Had they determined not to effect the repair at all, or not to embark upon the work until (say) the end of the following March, the respondents would have had no cause of action for the damage entailed upon them by such decision. No one could successfully have contended that in the latter case any extra damage occasioned to the respondents by reason of the breach in the wall remaining open to the sea between December 1 and the end of March was due to the negligent exercise by the appellants of the power conferred upon them by the Act. Upon what principle then can the appellants be made responsible for such damage merely by reason of the fact that they occupied the intervening time in making a futile attempt to effect the repair by a method that any reasonable person ought to have realized had no prospect of success? Supposing, moreover, that after having embarked upon the work of repair on

December 2—(as the appellants in fact did when Studd, upon the instructions of Clark, started a quite ridiculous attempt to fill up the breach by throwing into it bags of clay)—Clark had then decided that in view of the material and labour at his disposal it would be better to refrain from any further attempts at repair for the moment, upon what principle could the appellants have been held responsible for any damage caused by the delay?

My Lords, the respondents' answer to these questions that I have just propounded is, "The principle enunciated by Lord "Blackburn in the case of *Geddis* v. *Proprietors of Bann* "*Reservoir*" (1). It was in these words: "I take it, without "citing cases, that it is now thoroughly well established that "no action will lie for doing that which the Legislature has "authorised, if it be done without negligence, although it does "occasion damage to anyone; but an action does lie for doing "that which the Legislature has authorised, if it be done "negligently. And I think that if by a reasonable exercise of "the powers, either given by statute to the promoters, or which "they have at common law, the damage could be prevented, "it is within this rule 'negligence' not to make such reasonable "exercise of their powers." It is plain, however, on a careful reading of this passage that the damage to which Lord Blackburn is referring is the damage which "it"—i.e., the exercise of the power, occasions—and not damage that would in any case have been occasioned had the power never been exercised at all, or only exercised after a delay that might appear to be an unreasonable one. It is also to be observed that in the case which was then before this House, the damage of which Geddis was complaining was damage that he would not have sustained had the statutory authority refrained from exercising its powers. It was damage inflicted upon him by reason of the fact that the authority did exercise its powers. Unless in reading Lord Blackburn's words, that circumstance be borne in mind, and unless the exact language that he used be closely scrutinized, his words are very liable to be misunderstood. It was because one Sheppard misunderstood them

(1) 3 App. Cas. 430, 455.

that he brought an action against the Corporation of Glossop and was discomfited. The case is reported (1), and the facts of it so far as material were as follows. The corporation had the power of lighting the streets in their district, but were not under any obligation to do so. In exercise of this power they had erected a gas lamp in a street known as Dun Lane, but on one Christmas night the lamp was extinguished by one of their servants soon after 9 o'clock in pursuance of a general order issued by them from motives of economy. Now upon that evening the unfortunate Sheppard had been paying a visit to a friend's house, and left there at 11.30 P.M. His way home led him, or rather should have led him, along Dun Lane. But when nearing the lane he found the place was in complete darkness. The result was that he missed the proper entrance to the lane and wandered on to some adjoining land. He eventually arrived in the lane by falling over a retaining wall at its side, and was seriously injured. Feeling somewhat strongly, and not unnaturally, that any lighting authority which turned off the lights on a Christmas night at the early hour of 9 P.M. was acting in a highly unreasonable manner, he sued the corporation for damages caused by their negligence. The action was tried before Greer J. (as he then was) and resulted in judgment being entered for Sheppard. The learned judge found as a fact that the accident would not have happened if the lamp had been lighted. The corporation, however, took the case to the Court of Appeal, and their appeal was allowed. It is interesting to note the contention put before that Court by the learned counsel appearing for Sheppard, because it bears a very close resemblance to the argument advanced by the respondents on the appeal now before your Lordships' House. "Assuming," said the learned counsel (2), "that "the appellants are under no duty but are merely empowered "to light their district; and that if they had never lighted "Dun Lane the respondent would have had no cause of action; "yet having taken it upon them to light this place they were "bound to light it adequately." In support of this contention he cited the words of Lord Blackburn to which I have referred

(1) [1921] 3 K. B. 132.

(2) Ibid. 136, 137.

and upon which the decision of Greer J. had apparently been founded. The contention in effect was this: that although a statutory authority may have been given a power to do a particular thing without being placed under the obligation to do it, yet the moment that it sets about doing the particular thing, the statutory authority is in precisely the same position as it would have been in had the Legislature originally imposed upon it the duty of doing it. The contention was rejected, and in my opinion rightly rejected by the Court of Appeal. Bankes L.J. said (1) "The appellants have merely exercised "the discretion vested in them by the Legislature. They were "under no obligation to place a lamp post at this particular "spot; having placed it there they were not bound to keep it "there; and if they kept it there they were not bound to "supply it with gas, and are not to be made liable for merely "extinguishing the light at any particular hour." In making these observations the Lord Justice was not (as was made clear in an earlier part of his judgment) contemplating the case of a person being injured by running into an unlighted lamp that had been placed in the street by the corporation. The injury in that case would have been caused directly by the exercise of the power, i.e., it would not have been suffered at all had the corporation refrained from exercising the power. This distinction was very clearly pointed out by Scrutton L.J. Referring to local authorities who have had conferred upon them a discretionary power of lighting he said (2) "If they do light "they will be liable in damages for negligence in lighting; "negligence in allowing gas or electricity to escape; negligence "in putting posts in a highway without warning; and negligence "in placing traps and dangers in the streets and not lighting "them at night. But they are not liable merely because "in the exercise of their discretion they do not light, or "because they discontinue lighting, dangers which they "have not themselves created." Atkin L.J. (as he then was) said (3): "There is no duty to exercise the power of "lighting at all. Nor, if the local authority do light, are they

---

(1) [1921] 3 K. B. 143.

(2) Ibid. 149.

(3) Ibid. 150.

"obliged to light the whole of their district or any particular "part of it. They are under no duty to light all dangerous "places, or any dangerous place; and if they do light a "dangerous place for part of the night, they are not bound "to light it during the whole night. In this particular case "the local authority did not cause the danger; it was already "in existence."

My Lords, I have ventured to cite these passages at some length because they seem to lay down a principle which in my opinion is a thoroughly sound one. It is this: Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. If in the exercise of their discretion they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damages that he would have suffered had they done nothing. So long as they exercise their discretion honestly, it is for them to determine the method by which and the time within which and the time during which the power shall be exercised; and they cannot be made liable, except to the extent that I have just mentioned, for any damage that would have been avoided had they exercised their discretion in a more reasonable way.

In the present case the respondents in the exercise of their discretion selected, and for some time persisted in, a method of repairing the breach in the appellant's wall that no reasonable person would have adopted. I am willing to assume that the result of this was that the appellants were damaged by reason that the sea water entered and remained upon their marshland for a longer period than it would have done had the respondents adopted the best method of effecting the repair. No one, however, can question, or has attempted to question, the respondents' honesty, and in my opinion they cannot be made responsible for that damage. This was the view of the matter that commended itself to du Parcq L.J., and I respectfully agree with him. I would like in particular to express my concurrence in the following passage in his judgment: "The law would perhaps be more satisfactory, or at "any rate seem more satisfactory in some hard cases, if a "body which chose to exercise its powers were regarded as "being in exactly the same position as one upon which an "Act of Parliament imposed a duty. On the other hand, "it must be remembered that when Parliament has left it to "a public authority to decide which of its powers it shall "exercise, and when and to what extent it shall exercise them, "there would be some inconvenience in submitting to the "subsequent decision of a jury, or judge of fact, the question "whether the authority had acted reasonably, a question "involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims "of efficiency and thrift."

My Lords, for these reasons I would allow the appeal.

LORD PORTER. My Lords, in this case I have had the advantage of reading the opinion delivered by my noble and learned friend Lord Romer, and if we were not differing from the views expressed by the Court of Appeal I should be content to agree with the opinion he has expressed. Inasmuch, however, as I think that the appeal should be allowed, I consider it desirable that I should state very shortly why I have arrived at that conclusion.

It is common ground that an Act of Parliament may either impose a duty upon a public or other body or may grant them powers to do an act without creating any obligation upon them to undertake the task. It is conceded that whereas in the former case a body upon whom a duty is imposed must fulfil it with due care and expedition—in the latter case there is no obligation upon the body to do anything at all. If they choose for any reason which commends itself to them to leave the task unperformed no remedy can be obtained nor can any action be taken against them unless a right to do so is given by the Act which grants the power.

In the present case the Land Drainage Act, 1930, by the combined effect of ss. 6 and 34 gave power to a Catchment Board to maintain existing works, that is to say, to drain, repair or otherwise maintain in a due state of efficiency any

H. L. (E.)
1940
East Suffolk Rivers Catchment Board
v.
Kent.
Lord Porter.

existing watercourse or drainage work, but imposed no duty to do so. If the appellants had taken no action when the respondents' bank was broken and his land was flooded, no complaint could have been made, nor indeed could any steps have been taken though the appellants had delayed before taking action, however long the delay might have been. All this is admitted on behalf of the respondents, but it is contended that, when once the appellants chose to intermeddle by undertaking the work, they then were in the same position as if a duty had originally been imposed upon them. A power exercised is said to be the same as a duty imposed. In the present case the appellants did undertake the task of repairing the breach and I see no reason for differing from the finding of the learned judge and of the Court of Appeal that in carrying out the work they acted negligently and slothfully. If, then, their acceptance of the task imposed a liability to carry it out with care and circumspection, I should hold them liable for failure to perform what they had undertaken.

When once they had taken action it was, I think, clear that they were under some obligation to the owner of the land upon which their operations were being carried out. The question is not as to its existence but as to its extent.

The appellants acknowledged their liability for any damage directly due to the action which they took. Under a proper plea, they said, an increase in the amount of soil scoured out by the ebbing and flowing of the flood or damage caused by sacks and soil spread over the respondents' land due to the appellants' activities would form a proper head of damage, but no such claim was made ; the only loss complained of was that owing to the negligent delay in repairing the breach, the respondents' land was flooded for a longer period than it should have been.

Damage caused by anything negligently done by the appellants in the course of the exercise of their power which would not have occurred if they had refrained from exercising it at all would undoubtedly have to be made good on the principles set out in the well known words of Lord Blackburn in *Geddis* v. *Proprietors*

H. L. (E.)
1940
East Suffolk Rivers Catchment Board
v.
Kent.
Lord Porter.

of Bann Reservoir (1), already quoted by Lord Romer; but where, as here, the damage was not caused by any positive act on the part of the appellants but was caused and would have occurred to the like extent if they had taken no steps at all, I cannot see that the loss which the respondents suffered was due to any breach of a duty owed by the appellants. Their duty was to avoid causing damage, not either to prevent future damage due to causes for which they were not responsible or to shorten its incidence. The loss which the respondents suffered was due to the original breach, and the appellants' failure to close it merely allowed the damage to continue during the time which they took in mending the broken bank. For that I do not think them liable nor can I find any case the decision in which would lead to that result.

The principle expressed by Lord Blackburn does not depend upon his statement alone, it is to be found in cases decided before his time and has been repeated many times since. Indeed in the other case referred to by my noble and learned friend, *Sheppard* v. *Glossop Corporation* (2), Scrutton L.J. says: "But it is going far beyond Lord Blackburn's dictum "to say that because, when an option is given by statute to "an authority to do or not to do a thing and it elects to do the "thing and does it negligently, it is liable, therefore it is liable "if it elects not to do the thing, which by the statute it is not "bound to do at all."

"Because an authority elects to do a thing and does it "negligently it is liable," says Scrutton L.J. "An action "does lie for doing that which the Legislature has authorised "if it be done negligently," says Lord Blackburn.

But in each case the words must be read with reference to the matter which was being decided and the sense in which they were used is illustrated by the passage immediately preceding that which I have quoted from Scrutton L.J.: "Lord Blackburn's words are addressed to negligence in the "direct operation of the powers conferred and undertaken; "for instance if the appellants chose to light by electricity and "laid defective wires near to the main gaspipes in their district

(1) 3 App. Cas. 430, 455.

(2) [1921] 3 K. B. 132, 145.

"and so caused an explosion, that would be a negligent exercise "of their powers; or if they placed a refuge in a crowded "street and omitted to light it properly, that might be doing "negligently that which the Legislature authorized."

It is damage caused by negligently doing the act authorized, not damage which is not prevented because the act has not been done or has not been done efficiently or in time which is under consideration. If those who are authorized but not enjoined to act could be successfully sued for a failure to exercise their power I should have thought it unlikely that they would undertake the permitted task, since to do so would be to invite an action at the suit of any person who considered that they had not acted with due vigour and care.

The result might well be that in circumstances like those under consideration action would not be taken where immediate action was necessary. A local authority faced by such a series of disasters as occurred in the present case might consider that the flooded land was not very valuable, but that they were justified in making an attempt to clear it of water provided the expense was not serious, and think that the expenditure of some small sum would not be too great in an attempt to prevent the damage. In such a case, with their eyes fully open to the possibility of failure, they might think they were entitled to take a chance of remedying the position with that limited expenditure but would not feel justified in doing the work in some way which would ensure its success but at a great cost. If the respondents be right such a decision could never be made safely since the local authority by acting would expose themselves to the risk of an action for damages at the suit of a third party claiming that having undertaken the task the body to whom power had been given must continue with the work until it reached a successful conclusion though the expense would far exceed the value of the land they would thus have saved.

If to undertake the work were to accept the responsibility for completing it with due care and with reasonable dispatch, no prudent authority could safely act at all except in a case where certainty of success at a limited cost could be guaranteed.

H. L. (E.)
1940
EAST SUFFOLK RIVERS CATCHMENT BOARD v. KENT.
Lord Porter.

I do not say that these were the considerations which influenced the appellants in the present case, but the example given does, I think, illustrate the danger of acceding to the argument put forward on behalf of the respondents.

I should add that under the Act in question, if the local body fail to take action in a case where it is thought that they properly ought to do so, there is power for the person aggrieved, under s. 2 of the Act to apply to the Secretary of State for an order that they carry out such work as he instructs them to do.

I also desire to make it clear that in what I have said I am not dealing with a case in which it was contended that the authority were estopped from alleging that they were under no obligation to do the work efficiently and with reasonable dispatch. No evidence was given nor was there any plea that the appellants by their action had caused either of the respondents to change his position in reliance upon anything which they had said or done. Such a case must wait for decision until facts are alleged and proved such as would create an estoppel.

The sole question in the present case is whether the mere undertaking of a task which the Legislature has empowered an authority to do puts them in the same position as if that task had been imposed as a duty upon them. I agree that it does not and would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for Cobbold, Sons & Menneer, Ipswich.*

Solicitors for respondent: *J. R. Welch, Son & Algar, for Turner, Martin & Symes, Ipswich.*

Dictum of LORD RUSSELL OF KILLOWEN, at p. 128, *applied.* MURDOCK LOWNIE, LTD. *v.* NEWMAN. [1949] 2 All E.R. 783.

Dicta of LORD RUSSELL OF KILLOWEN and LORD ROMER, at pp. 126, 154, *applied.* FOWLER *v.* BRATT. [1950] 1 All E.R. 662.

Dictum of LORD RUSSELL OF KILLOWEN, at p. 129, *applied.* BENNETT, WALDEN & CO. *v.* WOOD. [1950] 2 All E.R. 134.

Applied. MCCALLUM. *v.* HICKS [1950] 2 K. B. 271

Distinguished. BENNETT *v.* MILLETT. [1949] 1 K. B. 362

Applied. FOWLER *v.* BRATT [1950] 2 K. B. 96

[HOUSE OF LORDS.]

H. L. (E.)*
1940
Aug. 7, 8, 12, 13, 14, 15, 19; *Dec.* 12.

LUXOR (EASTBOURNE), LIMITED, AND OTHERS . . . . APPELLANTS;

AND

COOPER . . . . RESPONDENT.

Principal and agent—Agent to receive commission if he effects sale—Right of principal to sell.

Where an agent is promised a commission only if he brings about the sale which he is endeavouring to effect there is no room for an implied term that the principal will not dispose of the property himself or through other channels or otherwise act so as to prevent the agent earning his commission.

Dissenting judgment of Scrutton L.J. in *Trollope and Sons* v. *Martyn Brothers* [1934] 2 K. B. 436, approved.

Prickett v. *Badger* (1856) 1 C. B. (N. S.) 296, distinguished.

Trollope and Sons v. *Caplan* [1936] 2 K. B. 382 held by Viscount Simon L.C. and Lord Romer to have been wrongly decided.

Decision of Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal reversing a decision of Branson J.

The facts, which are fully stated in their Lordships' opinions, were shortly these: the plaintiff Cooper sued the two companies, Luxor (Eastbourne), Ld., and Regal (Hastings), Ld., for commission which he alleged had been agreed to be paid to him in respect of an introduction by him of purchasers of the property of the two companies. He alleged that he produced ready and willing purchasers who were prepared to buy on the terms on which those companies were prepared to sell, and consequently that he was entitled, not indeed to the commission as such, because the sale never took place, but to damages of the same amount because he would have earned it had not the defendants broken the implied term of the contract between them by which they undertook to do nothing to prevent his earning the commission according to that contract.

The defendants by their defence pleaded that Mr. Garton who purported to make the contract was not authorized to do so; and that Mr. Griffiths, who was a director, was equally unauthorized to make the contract alleged by the plaintiff. Further they said that the contract included the payment of a large sum of commission to Mr. Ewbank, the auditor of the company, and the fact that he was in such a position of fiduciary relationship with the company, was sufficient to render the whole contract one which was unlawful and ultra vires the company.

---

* *Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT and LORD ROMER.

Branson J. came to the conclusion on the evidence that Garton had authority to contract to pay a procuration fee to Mr. Ewbank and Mr. Cooper, the present respondent, the contract which he made was that "on completion of "the sale of the two leasehold cinemas at Hastings and "Eastbourne respectively, to the London and Southern Super "Cinemas, Ld., a procuration fee of 10,000*l.* is to be paid to "Mr. Norman Cooper being 5000*l.* in respect of each of the "freehold cinemas at Hastings and Eastbourne." But no such sale took place, and that being so commission could not be recovered as such. It was said, however, on behalf of the plaintiff that according to the decisions in *Trollope & Sons* v. *Martyn Brothers* (1) and *Trollope & Sons* v. *Caplan* (2) every such contract as this must be deemed to contain an implied covenant and by this the plaintiff was entitled to recover damages though he could not recover commission as such. Branson J., however, held that the facts afforded a justification for the companies not continuing negotiations, many of their shareholders strongly objecting to the continuance of the negotiations, and he (Branson J.) could not say that they had no reasonable excuse for not going on and completing the contract which they were negotiating. He accordingly gave judgment for the defendants.

This judgment having been reversed by the Court of Appeal, the defendants appealed.

A. T. Miller K.C., *St. John Field K.C.* and *F. W. Beney* for the appellants. A person who claims to be entitled to

(1) [1934] 2 K. B. 436. (2) [1936] 2 K. B. 382.

commission must strictly prove the contract which he alleges entitles him to it. In this case there was no evidence to show that the respondent was so entitled. No commission was to be payable unless a sale was effected and none was effected. We rely on the dissenting judgment of Scrutton L.J. in *Trollope & Sons* v. *Martyn Brothers* (1), which we say correctly stated the law on this subject. Moreover, Ewbank acted in breach of his duty as auditor in contracting to be paid a commission or procuration fee. They cited *Prickett* v. *Badger* (2) and *Trollope & Sons* v. *Caplan* (3).

W. H. Cartwright Sharp K.C., *Cyril Miller* and *H. P. Levy* for the respondent. By the contract arrived at between the parties our client was requested to find a ready and willing purchaser for the properties in return for a commission to be paid to him. The respondent carried out his part on introducing an able and willing purchaser, and the appellants failed to show that they had reasonable or just cause or excuse for refusing to complete the sale. The view taken by Scrutton L.J. in *Trollope & Sons* v. *Martyn Brothers* (1) was too narrow and unsupported by authority; we submit that the views there expressed by Greer L.J. and Maugham L.J. were right and ought to be affirmed.

A. T. Miller K.C., in reply. While it is not possible to lay down a general principle to apply to all cases of the employment of a commission agent, what can be done is to ascertain what is the express arrangement arrived at. There is no room in this case for implying an undertaking by the companies to pay commission on an uncompleted transaction.

The House took time for consideration.

1940. Dec. 12. VISCOUNT SIMON L.C. My Lords, in this case the respondent, who was plaintiff in the action, issued his writ in April, 1937, claiming from each of the two appellant companies a sum of 5000*l.* as commission alleged to be due under an oral agreement made in September, 1935.

---

(1) [1934] 2 K. B. 436.

(2) (1856) 1 C. B. (N. S.) 296.

(3) [1936] 2 K. B. 382.

Alternatively, he claims the same amount as damages for breach of this agreement. The trial judge, Branson J., decided in favour of the appellants, but the Court of Appeal reversed this decision and gave judgment in favour of the respondent for a total sum of 8000*l.* as damages for breach of a term alleged to be implied in the commission agreement to the effect that the appellants would not without just cause so act as to prevent the respondent from earning his commission.

The appellants are private companies and were the freeholders of the Luxor Cinema at Eastbourne and of the Regal Cinema at Hastings respectively. The board of directors of each of the appellant companies was composed of the same individuals and a Mr. Garton was solicitor to each company; their auditor was one Ewbank. Prior to his death on September 11, 1935, one Walter Bentley, who was managing director of both companies, held the majority of the issued ordinary shares in Regal (Hastings), Ld., and also a large block of issued ordinary shares in Luxor (Eastbourne), Ld. On Mr. Walter Bentley's death, his son, Mr. Harry Bentley, became a director in his place. Mr. Harry Bentley and his mother were administrators of the estate of Mr. Walter Bentley. In the summer of 1935, Mr. Walter Bentley had asked Mr. Ewbank to get an offer for the purchase of the Luxor and Regal Cinemas, and Mr. Ewbank said he would approach his "client," meaning the respondent. Mr. Ewbank gave evidence that Mr. Bentley had said that he would see to it that Mr. Ewbank was paid a commission, but matters had not developed further before Mr. Walter Bentley's death. On September 16 Mr. Ewbank told Mr. Griffiths (who was one of the directors of the two companies) of his conversations with the late Mr. Bentley and two days later, after a directors' meeting of one of the appellant companies (as to which, however, no minute was produced) Mr. Griffiths told Mr. Ewbank that the directors had decided to sell, and that Mr. Ewbank's client should make his offer through Mr. Garton, who had the authority of the directors to deal with the matter. The next day Mr. Ewbank told the respondent of this and the latter shortly afterwards introduced to Mr. Ewbank, Colonel

Burton, who was a director of the London and Southern Super Cinemas, Ld., as willing to negotiate for the properties on behalf of that company. Mr. Ewbank took the respondent and Colonel Burton to meet Mr. Garton. Shortly before the meeting, Mr. Ewbank and the respondent had a preliminary meeting with Mr. Garton, when the respondent told Mr. Garton he wanted 10,000*l.* as commission "to cover both "himself and Ewbank."

It appears that the Regal (Hastings) company was in a position to obtain leases of two more cinema theatres at Hastings called the Elite and the De Luxe without cost to themselves, and on September 26, 1935, a company called Hastings Amalgamated Cinemas, Ld., was formed by Regal (Hastings), Ld., to acquire these leases, the intention being that they should be included in the proposed sale to Colonel Burton's company. Instead, however, of the shares in Hastings Amalgamated Cinemas, Ld., being all taken up by Regal (Hastings), Ld., the directors and Mr. Garton between them hit upon a plan by which they should themselves apply for 3000 out of the 5000 shares to be issued at par, so that Regal (Hastings), Ld., could only be allotted 2000 shares. As it was intended that out of the total purchase price of the four cinemas 15,000*l.* was to be allotted for the purchase of the two leasehold cinemas (for which Hastings Amalgamated Cinemas, Ld., had paid nothing), the result of this scheme would have been that the directors and Mr. Garton would have obtained for themselves a profit amounting to 6000*l.*, which would otherwise have accrued to Regal (Hastings), Ld., and its shareholders.

The discussions between Mr. Ewbank, Mr. Garton and Colonel Burton continued and at an interview, the date of which is not precisely fixed, but which was some day after September 19, Mr. Garton told Colonel Burton that he wanted a net purchase price for the four cinemas of 175,000*l.*, to which 10,000*l.* would have to be added for commission, making a total of 185,000*l.* Colonel Burton agreed "subject to "contract," and gave evidence at the trial that his company, the London and Southern Super Cinemas, Ld., remained

H. L. (E.)

1940

LUXOR (EASTBOURNE), LD. *v.* COOPER.

Viscount Simon L.C.

throughout, as the appellants knew, able and willing to buy the properties for this figure.

On October 2 Mr. Ewbank wrote to Mr. Garton, enclosing a letter of the same date written by Colonel Burton on behalf of his company offering 185,000*l.* for the various properties, subject to contract, and Mr. Ewbank's letter went on to say that "These offers are subject to your clients confirming to "Mr. Norman Cooper . . . . the agreed procuration fees, "namely, 5000*l.* to be paid by each of the vendor companies, "making a total of 10,000*l.* The payments to be made on the "completion of the purchases."

On October 11, Mr. Garton's firm replied to Mr. Ewbank: "We are instructed by our clients to confirm that, on completion "of the sale of the two leasehold cinemas at Hastings, and the "freehold cinemas at Hastings and Eastbourne, respectively, "to the London and Southern Super Cinemas, Ld., a procuration fee of 10,000*l.* is to be paid to Mr. Norman Cooper, "being 5000*l.* in respect of each of the freehold cinemas at "Hastings and Eastbourne."

There was a board meeting of the directors of Regal (Hastings), Ld., on October 2, at which Mr. Garton reported the offer which he had received and stated the commission demanded. The majority of the directors present were in favour of accepting the offer, but Mr. Harry Bentley opposed the motion and this was followed up next day by a letter from Mr. Bentley's solicitors, writing in the interests of the late Mr. Walter Bentley's estate, objecting to the size of the commission and also criticising the way in which the shares in Hastings Amalgamated Cinemas, Ld., were being taken up. The letter asked for an assurance that the proposals put before the board on the previous day would not be carried out, and added that if this assurance was not given, it would be necessary to consider the necessity of making an immediate application to the Court. There are no directors' minutes produced to show how this letter was dealt with, and it may seem somewhat surprising that Mr. Garton's firm should none the less have written on October 8 accepting Colonel Burton's offer and, as already stated, should have sent a confirmation on October 11 to Mr. Ewbank of the proposed arrangements about commission to be paid to Mr. Cooper.

Neither Mr. Garton nor any of the directors were called as witnesses at the trial and these matters were not cleared up. What, however, is more important is that, in the light of Mr. Bentley's protest, the sale to Colonel Burton's company was not proceeded with; indeed, no draft contract was ever submitted; and the disposal of the cinemas ultimately took place by way of a sale of shares in the appellant companies to another party.

The question to be now decided is whether the appellant companies are liable to the respondent in damages for not carrying through the sale to Colonel Burton's company, in which case the respondent would have earned his commission.

In the present case no commission note addressed to the respondent is produced, and the express contract is not contained in any document. The proof of it mainly depends on evidence given by the respondent at the trial in February, 1939, of the interview which he had with the appellants' solicitor, Mr. Garton, apparently in late September, 1935. There has been much argument whether it was proved that Mr. Garton had authority to act for the appellant companies in selling the properties and arranging the commission. Direct evidence of authority there is none, but I think (as did the trial judge and the Court of Appeal) that the minutes of the board meetings of the two companies, fragmentary as they are, are sufficient to provide ratification of Mr. Garton's agency. The respondent's oral account of the terms of the commission contract may be filled in by the letter from Garton and Company to Mr. Ewbank (who was to get forty per cent. of the commission for himself) dated October 11, 1935, confirming that a "procuration fee" of 10,000*l.* was payable on the sale to the London and Southern Super Cinemas, Ld., and that the commission was to be provided in equal shares by the two appellant companies—two points not mentioned in the oral evidence.

Such being the materials out of which the express contract has to be pieced together, what is the result? It seems to me that the express bargain was simply this: if a party introduced by the respondent should buy the cinemas for at least 185,000*l*., each of the two appellants would pay to the respondent 5000*l*. on the completion of the sale. No such sale, however, took place. Accordingly, there can be nothing due to the respondent on the terms of the express bargain. But it is said that since the proposed purchasers introduced by the respondent were and remained willing and able to buy the properties for the minimum price, while the appellants did not close with the offer, the appellants are liable in damages to the respondent for breach of an implied term of the commission contract. In the statement of claim the implied term is said to be that the appellants would "do nothing to "prevent the satisfactory completion of the transaction so as "to deprive the respondent of the agreed commission." The breach pleaded is the failure to complete the contract of sale with the respondent's client and the disposal of the subject matter in another quarter.

The implied term thus alleged is in any case too widely expressed, for the authorities relied on in support of the view that the express contract involves an implied term of this sort, concede that the alleged obligation on the vendor to complete the transaction if the commission agent's nominee remains able and willing to buy does not extend to cases where the vendor has "reasonable cause" for refusing to complete (per Greer L.J. in *Trollope & Sons* v. *Martyn Brothers* (1)) or as Maugham L.J. expressed it (2), "where there is no default "on the part of the vendor".

But what amounts to "reasonable cause" in this connection? If in the course of negotiating the contract of sale the parties come to loggerheads, how is the allocation of "default" determined? In the present case, Branson J. thought that "reasonable cause" existed, while the Court of Appeal considered that it did not. In his dissenting judgment in *Trollope & Sons* v. *Martyn Brothers* (3) Scrutton L.J. said that he could not agree with the view that it is

---

(1) [1934] 2 K. B. 436.
(2) Ibid. 458.
(3) Ibid. 436, 444.

H. L. (E.)
1940
LUXOR (EASTBOURNE), LD. v. COOPER.
Viscount Simon L.C.

"'necessary' to imply a term that the employer shall not "'without just cause' prevent the agent from earning his "commission, and as a corollary, that if he 'arbitrarily'" (i.e., "without alleging any just 'excuse'") "refuses to sell, "he is" (vis-à-vis the agent) "in default, though in an agreement subject to contract he breaks no contract with the "purchaser by refusing to complete without giving any reason." "This view," the Lord Justice went on to say, "seems to make "the subsidiary matter, the remuneration of the agent who "is to obtain a contract of sale, as of more importance than "the sale itself, which without breach of any contract with "the purchaser has not been completed or materialised. It "does not seem to me that a vendor taking an attitude towards "the purchaser which by his contract he is entitled to adopt, "if he gives no reason why he so acts except that it is in the "bond, is acting arbitrarily and therefore in some unspecified "default. Every man who receives and refuses without giving "a reason an offer which he is not bound to accept, may be "said to act arbitrarily, but I cannot understand why he is in "default."

The implied term upon which the respondent relies, following *Trollope & Sons* v. *Martyn Brothers* (1), amounts to saying that when once he has introduced his duly qualified nominee the appellants must look in no other direction for a purchaser, but are bound, in the absence of "just excuse," to do their best to sell to that nominee. It appears to me that this proposition leads to great difficulties in its application, and to great uncertainty as to what might amount to a just excuse. In the present case, the respondent was not appointed sole agent, and there might have been half-a-dozen competitors for the proffered commission. If the respondent's introduction of his nominee had been immediately followed by a better offer through another agent, would the appellants have been bound to refuse the latter, or to accept it only with the consequence of paying two commissions? If, after receiving the respondent's "name," and before becoming bound by contract of sale, the appellants sold the property to another purchaser

---

(1) [1934] 2 K. B. 436.

H. L. (E.)
1940
LUXOR (EAST-BOURNE), LD. v. COOPER.
Viscount Simon L.C.

without the intervention of any agent at all, would this expose the appellants to a claim by the respondent for damages? The contrary has been held, I think correctly, by McCardie J. in *Bentall, Horsley and Baldry* v. *Vicary* (1). Again, what would be the rights of the agent if he were employed on precisely corresponding terms to find a tenant for a house at a rent named? Can it be that the owner would be bound to accept the first tenant so offered to him who was willing to pay the rent? How would matters stand in such a case where the house is to be let furnished and the selection of a suitable tenant is therefore of particular concern to the landlord?

I find it impossible to formulate with adequate precision the tests which should determine whether or not a "just excuse" exists for disregarding the alleged implied term, and this leads me to consider whether there really is any such implied term at all.

The matter may be tested in this way. If such an implied term must be assumed, then this amounts to saying that when the owner gives the agent the opportunity of earning commission on the express terms thus stated, the agent might have added, "From the moment that I produce a duly qualified "offeror, you must give up all freedom of choice and carry "through the bargain, if you reasonably can, with my nominee," and the vendor must reply, "of course; that necessarily "follows." But I am by no means satisfied that the vendor would acquiesce in regarding the matter in this light. I doubt whether the agent is bound, generally speaking, to exercise any standard of diligence in looking for a possible purchaser. He is commonly described as "employed": but he is not "employed" in the sense in which a man is employed to paint a picture or to build a house, with the liability to pay damages for delay or want of skill. The owner is offering to the agent a reward if the agent's activity helps to bring about an actual sale, but that is no reason why the owner should not remain free to sell his property through other channels. The agent necessarily incurs certain risks, e.g., the risk that his nominee cannot find the purchase price or will not consent to terms reasonably proposed to be inserted in the contract of sale. I think, upon the true construction of the express contract in this case, that the agent also takes the risk of the owner not being willing to conclude the bargain with the agent's nominee. This last risk is ordinarily a slight one, for the owner's reason for approaching the agent is that he wants to sell.

---

(1) [1931] 1 K. B. 253.

If it really were the common intention of owner and agent that the owner should be bound in the manner suggested, there would be no difficulty in so providing by an express term of the contract. But in the absence of such an express term, I am unable to regard the suggested implied term as "necessary." The well known line of authorities, of which *Mackay* v. *Dick* (1), is a leading example, do not, in my opinion, lead to the conclusion drawn from them by the majority of the Court of Appeal in *Trollope & Sons* v. *Martyn Brothers* (2): If A employs B for reward to do a piece of work for him which requires outlay and effort on B's part and which depends on the continued existence of a given subject-matter which is under A's control (as in *Inchbald* v. *Western Neilgherry Coffee Co.* (3)) there may be an implied term that A will not prevent B doing the work by destroying the subject-matter. And, generally speaking, where B is employed by A to do a piece of work which requires A's co-operation (e.g. to paint A's portrait), it is implied that the necessary co-operation will be forthcoming (e.g. A will give sittings to the artist). But the work which the respondent was invited to do was to produce an offer for the property—a piece of work which does not require the appellants' co-operation at all (except in giving a prospective purchaser reasonable opportunity to inspect the property which no doubt would be an implied term)—and I am unable to deduce from the fact that the respondent was invited to produce an offer the implication that the appellants promised the respondent that they would accept it unless "just excuse" for refusal existed.

---

(1) (1881) 6 App. Cas. 251.
(2) [1934] 2 K. B. 436.
(3) (1864) 17 C. B. (N. S.) 733.

H. L. (E.)
1940
LUXOR (EASTBOURNE), LD. v. COOPER.
Viscount Simon L.C.

In my view, therefore, the respondent's claim fails because the implied term suggested is not proved to exist, and it is unnecessary to consider whether the objections taken on behalf of Mr. Harry Bentley in the letter of October 3, and the risk of controversy or litigation arising if the original scheme had been carried through, constituted "just cause" for failing to accept Colonel Burton's offer. I am unwilling unnecessarily to comment on the action of Mr. Garton and the directors in proposing themselves to subscribe for the majority of the shares in Hastings Amalgamated Cinemas, Ld., since they were not parties to the present litigation and the decision whether they should be called as witnesses or not presumably did not rest with them. Their explanation, whether good or bad, has not been heard in this action.

The present Master of the Rolls, in concluding his judgment in *Trollope & Sons* v. *Caplan* (1), expressed the view that the case law as to the rights and obligations of house agents and their clients with regard to the sort of questions then under discussion was not in a very satisfactory condition, and that it was desirable that the whole position should be reviewed, if opportunity offered, in the House of Lords. du Parcq L.J. in the present case, expressed his agreement with this view. I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Wright, in which he examines a number of the cases, on which I do not myself comment in this opinion, and I am glad to adopt his conclusions concerning them.

There is, I think, considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication, of other terms. There are some classes of contract in which an implied term is introduced by the requirements of a statute (for example, under the Sale of Goods Act or the Marine Insurance

(1) [1936] 2 K. B. 382, 401.

Act); there are other contracts where an implied term is introduced by the force of established custom (for example, the necessity of a month's notice in the case of hiring a domestic servant); but in contracts made with commission agents there is no justification for introducing an implied term unless it is necessary to do so for the purpose of giving to the contract the business effect which both parties to it intended it should have.

It may be useful to point out that contracts under which an agent may be occupied in endeavouring to dispose of the property of a principal fall into several obvious classes. There is the class in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward, it is obvious that he is entitled to be paid when this has been done, whether his principal accepts the offer and carries through the bargain or not. No implied term is needed to secure this result. There is another class of case in which the property is put into the hands of the agent to dispose of for the owner, and the agent accepts the employment and, it may be, expends money and time in endeavouring to carry it out. Such a form of contract may well imply the term that the principal will not withdraw the authority he has given after the agent has incurred substantial outlay, or, at any rate, after he has succeeded in finding a possible purchaser. Each case turns on its own facts and the phrase "finding a "purchaser" is itself not without ambiguity. *Inchbald's* case (1) might, I think, be regarded as falling within this second class. But there is a third class of case (to which the present instance belongs) where, by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between the offeror and his principal. As I have already said, there seems to me to be no room for the suggested implied term in such a case. The agent is promised a reward in return for an event, and the event has not happened. He runs the risk of disappointment, but if he is not willing to run

(1) 17 C. B. (N. S.) 733.

the risk he should introduce into the express terms of the contract the clause which protects him.

The oft-quoted case of *Prickett* v. *Badger* (1) must, I think, be regarded as turning on its special facts, which were very unusual. There the defendant invited the plaintiff to concern himself, for reward, in the sale of a piece of freehold land, although the defendant had no interest in the land whatsoever. I can well understand that in such circumstances the plaintiff, after incurring outlay and exerting himself to produce the would-be purchaser, could make good a claim for a quantum meruit. The report attributes to Pollock C.B., who tried the case at Assizes, the assertion that if a man places in the hands of several house-agents a house which he is desirous of letting or selling, "though the successful agent alone would be "entitled to claim commission, the others would clearly be "entitled to something for their trouble." If the Chief Baron really made this observation, it certainly is not in accordance with the usual result of arrangements made with house agents, and it should be noted that Williams J. (2) speaks of "the "implied understanding that the agent is only to receive a "commission if he succeeds in effecting a sale, but, if not, "then he is to get nothing."

Trollope & Sons v. *Martyn Brothers* (3) was also a case with unusual special facts, for, though the offer produced by the plaintiffs was "subject to contract," matters had proceeded so far that the draft terms of contract proposed by the defendant had been accepted and signed by the would-be purchaser, and there was nothing whatsoever to explain why the contract did not go through other than the unwillingness of the defendant to proceed. The judgment of my noble and learned friend, Lord Maugham (then Maugham L.J.), in favour of the plaintiffs largely turned on these special facts, and for that reason I venture to doubt whether he would necessarily have approved of the later decision in *Trollope & Sons* v. *Caplan* (4), where the Court of Appeal was endeavouring to apply the earlier case. However that may be, for the reasons

(1) 1 C. B. (N. S.) 296.

(2) Ibid. 305.

(3) [1934] 2 K. B. 436.

(4) [1936] 2 K. B. 382.

which I have stated, I prefer the minority view of Scrutton L.J. in *Trollope & Sons* v. *Martyn Brothers* (1), and am of opinion that that case and the following case of *Trollope & Sons* v. *Caplan* (2) were wrongly decided.

I move that this appeal be allowed.

Lord Russell of Killowen. My Lords, in this case the plaintiff seeks to recover from each of the defendant companies a sum of 5000*l.*, alleging that that amount is due to him from each of them for commission under a contract made between himself and a solicitor, named Garton, who acted as legal adviser to the two companies. Garton's authority to make any such contract on their behalf was denied by the companies. The authority, if it existed, might have been proved by resolutions of board meetings conferring the authority, or by the evidence of directors, or by the evidence of Garton. No such evidence was tendered. Nevertheless, Branson J. (who tried the action) was of opinion that Garton's authority had been proved by statements in letters written by Garton, and by a minute of a meeting of the board of one of the defendant companies, held on October 2, 1935. The Court of Appeal agreed with this opinion of Branson J. Had the matter rested there it would seem that no authority had been proved at all; because Garton's letters are no evidence of the truth of any statement therein, and the minute on its true construction does not indicate that the two sums of 5000*l.* are payable by the defendant companies. The matter, however, does not rest there. There is some evidence by the witness Allwood which, vague though it is, does testify to knowledge and approval by the directors of the fact that a contract had been made, binding their companies to pay the 10,000*l.* Upon this evidence it may possibly be said that Garton's promise on behalf of the two companies had been adopted or ratified so as to become binding upon the companies. In these circumstances it would not in my opinion be right to dispose of this case summarily upon the ground that the plaintiff had failed to establish the first essential to the validity of his claim.

(1) [1934] 2 K. B. 436.

(2) [1936] 2 K. B. 382.

In proceeding to discuss the other aspects of the case, I will refrain from repeating the facts which led up to this litigation. They have been fully stated, and I will assume that they are present to your Lordships' minds.

At the outset we must ascertain what were the terms of the contract which Garton and the plaintiff made. The action is not brought on a commission note. The only contract pleaded and sued upon, is an oral contract made between those two. The evidence as to it is quite short. It is the evidence of what occurred at an interview in Garton's office on September 23, 1935, at which Garton, Ewbank, and the plaintiff were present. Garton was not called. All that Ewbank says is that the plaintiff wanted 10,000*l*. and that Garton "at the time agreed "the figure." The plaintiff gave a rather more detailed account in the following words:—"I told Mr. Garton that I had a "friend who was prepared to negotiate, and we discussed the "price, and I told him I expected to get a commission. He "told me the lowest price that they would take, and any "commission I got would have to be added to that price. "The price he gave me was 175,000*l*. I said I was going to "add 10,000*l*. to it. He said, 'As long as the purchasers do not "'object, I do not mind.'" That is the whole of the oral evidence as to the contract. The subsequent letters between Garton and Ewbank of October 2, 8 and 11, 1935, merely purport to confirm the oral agreement already made. They add nothing; they only show that when the parties at the interview spoke of 10,000*l*. being added to the price, they meant that 5000*l*. would be added to the price received by each of the two companies, and that each company would only be liable for its 5000*l*. accordingly. Upon the oral evidence, the only contract between the parties was one which in my opinion must be stated thus:—"If a particular friend of the "plaintiff paid at least 185,000*l*. for the four cinemas, the two "companies would each pay to the plaintiff 5000*l*. out of the "price paid." That is the only contract proved in this case.

The next question for consideration is what liability (if any) was placed upon the companies under that contract, in the event (which happened) of the contemplated sale to the plaintiff's friend never having been carried to completion, with the result that the price, in which the commission was included, was never paid? In my opinion, in that event no liability attached to the companies. The only right of the plaintiff was to receive his commission out of the purchase moneys if and when received. His right was a purely contingent right. He stood to earn a very large sum at comparatively small pains, taking the risk of either side withdrawing from the negotiations before any binding contract of sale and purchase was concluded, or of the contract (if any) for any reason not being carried to completion.

My Lords, upon this view of the oral contract which is the foundation of the plaintiff's claim, the action must fail. No question arises for the decision of this House in relation to the correctness or otherwise of the views expressed in the Court of Appeal in the cases of *Trollope & Sons* v. *Martyn Brothers* (1) and *Trollope & Sons* v. *Caplan* (2). The question of these commission contracts was, however, discussed at great length and in great detail before your Lordships, and this must be my excuse for stating briefly conclusions which my mind, free as it is from the fetter of previous decisions, has reached.

A few preliminary observations occur to me. (1.) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (2.) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms. And (3.) contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the

(1) [1934] 2 K. B. 436.
(2) [1936] 2 K. B. 382.

agent. There is no real analogy between such contracts, and contracts of employment by which one party binds himself to do certain work, and the other binds himself to pay remuneration for the doing of it.

I do not assent to the view, which I think was the view of the majority in the first *Trollope* case (1), that a mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price, or at a minimum price, ties the owner's hands, and compels him (as between himself and the agent) to bind himself contractually to sell to the agent's client who offers that price, with the result that if he refuses the offer he is liable to pay the agent a sum equal to or less than the amount of the commission either (*a*) on a quantum meruit or (*b*) as damages for breach of a term to be implied in the commission contract. As to the claim on a quantum meruit, I do not see how this can be justified in the face of the express provision for remuneration which the contract contains. This must necessarily exclude such a claim, unless it can (upon the facts of a particular case) be based upon a contract subsequent to the original contract, and arising from some conduct on the part of the principal.

As to the claim for damages, this rests upon the implication of some provision in the commission contract, the exact terms of which were variously stated in the course of the argument, the object always being to bind the principal not to refuse to complete the sale to the client whom the agent has introduced.

I can find no safe ground on which to base the introduction of any such implied term. Implied terms, as we all know, can only be justified under the compulsion of some necessity. No such compulsion or necessity exists in the case under consideration. The agent is promised a commission if he introduces a purchaser at a specified or minimum price. The owner is desirous of selling. The chances are largely in favour of the deal going through, if a purchaser is introduced. The agent takes the risk in the hope of a substantial remuneration for comparatively small exertion. In the case of the plaintiff his contract was made on September 23, 1935; his client's offer was made on October 2, 1935. A sum of 10,000*l.* (the equivalent of the remuneration of a year's work by a Lord Chancellor) for work done within a period of eight or nine days is no mean reward, and is one well worth a risk. There is no lack of business efficacy in such a contract, even though the principal is free to refuse to sell to the agent's client.

---

(1) [1934] 2 K. B. 436.

The position will no doubt be different if the matter has proceeded to the stage of a binding contract having been made between the principal and the agent's client. In that case it can be said with truth that a "purchaser" has been introduced by the agent; in other words the event has happened upon the occurrence of which a right to the promised commission has become vested in the agent. From that moment no act or omission by the principal can deprive the agent of that vested right.

My Lords, for myself, I do not favour the view that an agent who has not earned his commission according to the express terms of the contract is entitled to damages for breach of some term to be implied. I see no necessity which compels the implication. The view is, as I read the authorities, founded in its origin upon the observations of Willes J. in the case of *Prickett* v. *Badger* (1). I have carefully considered those observations, and I do not think that they justify the view which has been founded upon them. The case was one purely of a quantum meruit claim. It was not a claim for damages for breach of any contract express or implied. It was an action on the common counts for work and labour, on the footing that, because owing to the principal's action the promised commission could not be claimed, the plaintiff was entitled to be remunerated on a quantum meruit for the work and labour actually done. It was a claim to be remunerated in accordance with an alleged contract. The Chief Baron who tried the case directed the jury that the plaintiff was entitled to remuneration for his work and labour, not, be it observed, to damages for breach of contract. The jury returned a verdict for 50*l.* It was the defendant who appealed on the ground that the plaintiff was entitled to nothing, and

(1) 1 C. B. (N. S.) 296.

it was on his appeal that a new trial on the quantum meruit was ordered. The reason for this was that the verdict was manifestly insufficient, because since the plaintiff had done the whole of the work for which but for the defendant's action he would have been remunerated by the commission, the quantum to which he must be entitled on the quantum meruit claim could not be only 50*l.*, but must be a sum equal to the amount of the promised commission. That is the whole of the decision, and it is in support of that decision that Willes J. used the language which is relied upon in the subsequent authorities to establish the existence of the alleged implied term, that the principal will not prevent the agent from earning his commission. The judgment of Willes J. is short. The relevant portion runs thus: "It is quite clear that the plaintiff was "entitled to some remuneration. In pursuance of the retainer "he proceeded to find a purchaser for the land; and it was "only the defendant's disinclination or inability to proceed "that prevented the sale being completed. The plaintiff would "have been entitled to receive the commission agreed on, if "the defendant's conduct had not prevented his earning it. "I must confess I do not see why the jury should not have "given him the full amount. The learned judge being dis-"satisfied with the verdict there must be a new trial upon the "terms suggested."

I can find there no hint or indication of any implied term, or of any right to damages for its breach. As I read it, the judgment deals only with the quantum recoverable on a claim for work and labour, and points out that the quantum so recoverable must, in the circumstances, be equal to the amount of the commission, since the parties had by the original contract agreed that that amount was the proper amount payable in respect of the identical amount of work and labour.

My Lords, it may be that, in the light of later authorities the plaintiff in *Prickett* v. *Badger* (1) was not, in view of the express contract, entitled to anything on a quantum meruit. On the other hand, he may have been so entitled, on a subsequent contract to be implied between the parties. The facts are not very clearly stated. But this is immaterial. What is material is that the observations of Willes J. do not, as I read them, establish the existence of the alleged implied term, or the right of the agent to recover damages for breach thereof.

---

(1) 1 C. B. (N. S.) 296.

As I have already indicated, the case under consideration is quite different from a contract by which an agent is employed and is by the contract of employment bound to do specified work for the principal. Such was the case of *Inchbald* v. *Western Neilgherry Coffee Co.* (1). In such contracts a term must, if not expressed, necessarily be implied that the principal will do nothing to prevent the agent from doing the work which the contract binds him to do.

I must confess that I find a difficulty in seeing how the case of *Trollope & Sons* v. *Martyn Brothers* (2) came to be decided in favour of the agents in view of the terms of the contract which they had made with the principal. They introduced a proposed purchaser who offered 20,500*l.* subject to contract. They were then instructed by the defendants by telephone to accept the offer subject to contract. They then wrote to the defendants a letter enclosing a copy of the offer, asking for a written acceptance and concluding with the following words: "We take this opportunity of confirming that in the "event of the sale materialising we shall look to you for pay-"ment of the usual commission." To that letter the defendants replied stating that "in the event of this sale being satis-"factorily completed, we shall pay you the usual scale of commission." I cannot imagine (upon the terms of the contract) a clearer case of the title to the commission being made wholly contingent on the sale being carried to completion, and of the agents taking the risk of the sale falling through from any cause whatever. In my view there was on the terms of that contract no possibility for the implication of any such term as was discussed in the judgments. Indeed, it would be a case of implying a term in variation of the express contract.

My Lords, in my opinion there is no necessity in these contracts for any implication; and the legal position can be stated thus:—If according to the true construction of the contract the event has happened upon the happening of which the agent has acquired a vested right to the commission (by which I mean that it is debitum in praesenti even though only solvendum in futuro), then no act or omission by the principal or anyone else can deprive the agent of that right; but until that event has happened the agent cannot complain if the principal refuses to proceed with, or carry to completion, the transaction with the agent's client.

---

(1) 17 C. B. (N. S.) 733.

(2) [1934] 2 K. B. 436.

I have already expressed my view as to the true meaning of a contract to pay a commission for the introduction of a purchaser at a specified or minimum price. It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price; but such a construction of the contract would in my opinion require clear and unequivocal language.

I will only add this in reference to the case before us. Even if I had agreed with the views of the majority of the Court in *Trollope & Sons* v. *Martyn Brothers* (1), I would have said that the defendants had good and sufficient excuse for refusing to proceed with the sales of the cinemas. I feel little doubt that the Court would have restrained the carrying out of the sale, at least until after the respective shareholders had been informed of the facts, and had had an opportunity of expressing their views in general meeting.

In my opinion this appeal should be allowed and the order of Branson J. restored.

My Lords, I understand that my noble and learned friend, Lord Thankerton, who is unable to be here to-day, agrees with the opinion which I have just expressed to your Lordships.

LORD WRIGHT. My Lords, the question in this case is whether the respondent is entitled to recover from each appellant the sum of 5000*l.* as moneys due under a commission agreement, or, alternatively, damages for breach of the agreement. He failed before Branson J. but succeeded on his claim for damages in the Court of Appeal. The action was

(1) [1934] 2 K. B. 436.

founded on an agreement for the payment of commissions in respect of the contemplated sale of freehold and leasehold properties belonging to the appellants and to a subsidiary company. The decision of the case depends on the terms of the agreement, which in appearance are simple enough, but the questions involved have been complicated by the accumulation of authorities which have helped or hindered Courts when deciding disputes in regard to commission agents' agreements. In particular this House has been invited to pronounce on a judgment of the Court of Appeal, *Trollope & Sons* v. *Martyn Brothers* (1), which I shall refer to as *Martyn's* case, since followed by the Court of Appeal in *Trollope & Sons* v. *Caplan* (2), which I shall refer to as *Caplan's* case. *Martyn's* case (1) has been again discussed in *Kahn* v. *Aircraft Industries Corporation* (3), and has finally been applied by Branson J. and the Court of Appeal, though with a difference of result, in the present case. It is clear that some difficulty has been experienced in applying the decision in *Martyn's* case (1). It was the decision of a majority of the Court, Scrutton L.J. dissenting. In *Caplan's* case (2), Greene L.J. expressed the opinion that the authorities as to the rights and obligations of house agents and their clients with regard to such questions are not in a very satisfactory condition and hoped that the whole position might be one day reviewed by this House. A similar hope was expressed in the present case by du Parcq L.J.

However that may be, what is in question in all these cases is the interpretation of a particular contract. I deprecate in general the attempt to enunciate decisions on the construction of agreements as if they embodied rules of law. To some extent decisions on one contract may help by way of analogy and illustration in the decision of another contract. But however similar the contracts may appear, the decision as to each must depend on the consideration of the language of the particular contract, read in the light of the material circumstances of the parties in view of which the contract is made.

(1) [1934] 2 K. B. 436.
(2) [1936] 2 K. B. 382.
(3) [1937] 3 All E. R. 476.

I shall therefore in the first instance examine the particular contract in question in the light of the material facts. I shall later touch on certain of the authorities which have been debated before your Lordships. It is important to simplify as far as possible the problem of construing commission agency agreements, especially in regard to the sale of houses and land. These are of common occurrence among all classes of the community and it is most undesirable that subtleties and complications of interpretation calculated to lead to disputes should be allowed to confuse what is ex facie a plain and simple agreement.

Your Lordships are already possessed of the facts in detail. I may therefore state those which seem to me to be essential as briefly as possible.

The appellants, Luxor (Eastbourne), Ld., owned the freehold of the Luxor Cinema at Eastbourne. The appellants, Regal (Hastings), Ld., owned the freehold of the Regal Cinema at Hastings. There were also two other cinemas in Hastings, the Elite and the Cinema de Luxe. To acquire the leases of these two cinemas a subsidiary company, called Hastings Amalgamated Cinemas, Ld., was formed by the appellants, Regal (Hastings), Ld. This company in fact acquired the leases on October 7, 1935.

The boards of directors of the two appellant companies were composed of the same individuals. Walter Bentley was managing director of both companies and held a majority of shares in the Luxor and a large percentage of the shares in the Regal. He died on September 11, 1935, but shortly before his death he had taken steps with a view to disposing of the cinemas. The respondent, who described himself as an insurance and finance broker, was acquainted with Mr. W. F. Ewbank, the auditor of the two appellant companies, who introduced him to Mr. Garton, their solicitor. He had stated that he had a friend who might be a purchaser of the properties. About the latter part of September he had an interview with Mr. Garton, at which Mr. Ewbank was present. His account of what occurred was that he told Mr. Garton that he had a friend who was prepared to negotiate. The price was discussed and he told Mr. Garton that he expected to get a commission. Mr. Garton said the lowest price the appellants would take was 175,000*l*., and any commission which the respondent got would have to be added to the price. The amount of the commission which the respondent said he required was 10,000*l*. Mr. Garton replied that, so long as the purchasers did not object, he did not mind. A little later the respondent saw Mr. Garton again and asked him to let him have a commission note. Mr. Garton said he would do so, but would like to consult the directors before he actually sent the commission letter or note. The commission note was to be made out to the respondent but the commission was to include everybody; in fact the respondent had agreed with Mr. Ewbank to share it with him in the proportion of 60 to 40. The respondent's friend was Colonel Burton, chairman of the London and Southern Super Cinemas, Ld. On October 2, 1935, Mr. Ewbank sent on to Mr. Garton a letter from Colonel Burton on behalf of his company containing an acceptance with certain variations of an offer which Mr. Garton said that he was authorized by the chairman of the two appellant companies to make. Colonel Burton's offer was of 185,000*l*. for the properties—97,500*l*. for the Hastings properties and 87,500*l*. for the Eastbourne property. The offers were to be inter-dependent. It is important to note that it was all "subject to contract." Mr. Ewbank's letter to Mr. Garton enclosing Colonel Burton's offers stated that the offers were subject to his clients (the appellants) confirming to Mr. Norman Cooper (the respondent) the agreed procuration fee, namely 5000*l*. to be paid by each of the vendor companies, making a total of 10,000*l*. The letter concluded "The payments to "be made on the completion of the purchases."

On October 8, 1935, Garton & Co. wrote to Colonel Burton's company accepting their offer "subject to contract." On October 11, 1935, Garton & Co. wrote to Mr. Ewbank confirming that "on completion of the sale" of the properties to the London and Southern Super Cinemas, Ld., the procuration fee of 10,000*l*. was to be paid to the respondent, being 5000*l*. in respect of each of the two freehold cinemas. Whether these letters or either of them were written by Garton & Co. with the appellant companies' authority has been the subject of debate. It would be outside the apparent authority of the appellant companies' solicitors to bind the companies by these letters. Actual authority would need to be shown. As to the letter purporting to accept the offer of purchase, there is, in my opinion, no evidence of actual authority. That, however, is not material in this appeal since no contract was ever agreed and the stage of negotiation was never passed. As to the letter confirming the commission to the respondent, the Courts below have held that it bound the companies. No minute of the directors of either company recording any resolution in confirmation of the commission letter has been produced. On the other hand, there is evidence which may be regarded as sufficient to show that the directors ratified the commission agreement. I accordingly do not differ from the conclusion of the Courts below that the commission agreement bound the appellant companies. But on October 2, 1935, solicitors representing the late Mr. Bentley's interests had written to each of the directors protesting against the proposed sale of the properties, and threatening an application to the Court unless an assurance was given that these proposals would not be acted upon. About the same time proposals were made from another quarter for the sale by the directors and the majority shareholders of their shares to a different company, Union Cinemas, Ld., on the basis of 175,000*l.* as the price for the whole of the shares, without any commission. On or about October 24, 1935, an arrangement was concluded between the appellant companies and Union Cinemas, Ld., on this basis. Thus the negotiation with the purchasers introduced by the respondent never resulted in a contract and no sale was ever completed with, or payment made by, the London and Southern Super Cinemas, Ld. The Courts below held that this company was ready to buy and was able to arrange finance. The Court of Appeal held that the respondent could not claim payment of the 10,000*l.*, or rather the two sums of 5000*l.* each, because the right to payment did not accrue until completion, but that as the respondent had proved complete performance on his part he was entitled to claim damages. Scott L.J. thus sums up his opinion:

"If" (as he held) "the respondent had performed his part "and if the true reason that the sale fell through was the "unwillingness of the boards of the defendant companies to "carry out the deal, then there came into operation the implied "promise of the defendant companies to do nothing to prevent "the deal going through, so as to prevent the plaintiff from "earning his commission after he had done all he had promised "to do." This implied promise was, however, subject to the proviso that the companies should have no just cause or reasonable excuse for their conduct. He held accordingly that the respondent was entitled to damages from the appellant companies because they showed no just cause or reasonable excuse. In this conclusion with which the other members of the Court of Appeal substantially agreed he followed and applied the decision in *Martyn's* case (1). The Court held in effect that as the appellant companies had, in the circumstances stated, changed their mind, it could not be said that in "preventing" the payment of commission they had a just cause or reasonable excuse within the ruling of *Martyn's* case (1). Branson J. had held that certain proceedings of the directors in regard to the shares in the subsidiary company, Hastings Amalgamated Cinemas, Ld., together with the solicitor's letter threatening an application to the Court, constituted a reasonable excuse or just cause for abandoning the negotiations with Colonel Burton, and on that ground dismissed the claim. I need not decide between these conflicting opinions because, as I proceed to explain, I do not accept that this contract was subject to any such implied term as the Court below has held, and on that ground alone the action in my opinion fails.

The respondent, in his statement of claim, does not allege that the letters of October 2 and 11, 1935, embody the agreement but claims on an oral agreement said to have been made at the end of September, 1935, by the respondent in the presence of Mr. Ewbank and by Mr. Garton representing the appellant companies that the respondent should "in the event "of his finding a suitable purchaser for the four theatres at a "price of not less than 185,000*l*. receive commission of 5000*l*. "from each of the (appellant) companies, making 10,000*l*. "in all." The evidence of the respondent set out above does not precisely bear out this allegation; in particular there is in that evidence no splitting up of the 10,000*l*. between the two appellant companies, nor any reference to the time at, or condition on which, the commission was to be payable unless that is to be inferred from the term that it was to be added to the price. Mr. Ewbank's evidence as to the oral interviews does not carry the matter any further. But the evidence is clear that a commission note was contemplated and asked for. In my opinion the intention was that that note should reduce the agreement, or at least the essential terms, into writing, This would be in accordance with the usual course of business, especially where the contemplated commission is large. The agent naturally in cases of this type wants some written acknowledgment of his right to commission, something in the nature of a document of title. It is not necessary to consider whether the letters which I think constituted the commission note did or did not contain the whole of the contract. In my opinion, they contained all the terms material to this dispute and in so far as they contained these terms should be regarded as embodying the contract. Mr. Ewbank's letter of October 2, 1935, obviously presupposed some arrangement or contract. It was on that footing that he sent on Colonel Burton's offer, and, as well as sending on the offer, actually disclosed his client's name. Though Colonel Burton's company was at all times willing to purchase the properties, if contracts were arranged and exchanged, and was financially able to complete, the essential term in the commission letters was "on completion of the sale." That may be represented in the respondent's evidence of the oral agreement by the term that the 10,000*l*. would have to be added to the price paid by the purchasers and from this the inference might be drawn that the 10,000*l*., not so far split up, was to be paid only on payment of the price. There is nothing unusual in an agreement that

---

(1) [1934] 2 K. B. 436.

Lord Wright.

commission is to be payable out of the purchase price when received by the vendors. But the expression used in the letters "on completion of the sale," is, I imagine, the more normal formula, and was obviously in this case chosen by the parties as the precise expression of their agreement. The two expressions may be for practical purposes the same, though not technically identical. I shall, however, treat the agreement here as being for payment on completion of the sale. In any event the agreement contained not merely the stipulation of a point of time at which, but the expression of a condition on which, the payment was to become due. The respondent had in pursuance of his undertaking introduced the prospective or potential purchaser. Substantially the consideration emanating from him had been executed. But the reciprocal consideration on the part of the appellant companies was in the future; their promise was only to pay on completion of the sale and thus the promise only took effect on the happening of that event. I think all the Courts below have accepted this construction of the contract. The claim pleaded was that a vested right to payment of commission arose when an able and willing purchaser was introduced. At a certain stage of the argument before the House Mr. Cartwright Sharp advanced that contention, according to which the date of completion was merely a point of time for paying the commission so that on failure of completion commission was payable within a reasonable time. But it has long since been held that, at least prima facie, such words in a commission agreement state the event on which, as a condition, the right to payment accrues to the agent and the obligation to pay attaches to the principal. I think that is the correct construction of the agreement in this case. That condition was never fulfilled, so that the right to be paid never materialized.

The question then is whether a term is to be implied as held by Scott L.J. on the basis of the authority of *Martyn's* case (1). I shall here state at once that notwithstanding the great respect which I feel for the two Lords Justices who formed the majority in *Martyn's* case (1), I prefer the reasoning of

(1) [1934] 2 K. B. 436.

H. L. (E.)
1940
LUXOR (EASTBOURNE), LD.
v.
COOPER.
Lord Wright.

Scrutton L.J. in his dissenting judgment. The hesitation I have felt in differing from the two Lords Justices has made me examine the whole question at perhaps undue length. Before I examine the authorities I shall attempt to state from an analysis of the agreement now before the House why I am of opinion that the particular term should not be implied.

The expression "implied term" is used in different senses. Sometimes it denotes some term which does not depend on the actual intention of the parties but on a rule of law, such as the terms, warranties or conditions which, if not expressly excluded, the law imports, as for instance under the Sale of Goods Act and the Marine Insurance Act. The law also in some circumstances holds that a contract is dissolved if there is a vital change of conditions. But a case like the present is different because what it is sought to imply is based on an intention imputed to the parties from their actual circumstances.

There have been several general statements by high authorities on the power of the Court to imply particular terms in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. But it is well recognized that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying," some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties.

These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts. But language is imperfect

H. L. (E.)
1940
LUXOR (EAST-BOURNE), LD.
v.
COOPER.
Lord Wright.

and there may be, as it were, obvious interstices in what is expressed which have to be filled up. Is there then any reason in the present case for thinking that there is some defect in expression or something omitted because it seemed too obvious to express ? I cannot find any such reason.

There is no indication in the oral evidence that the parties contemplated that the agents should have any right to be paid anything except out of a purchase price paid by the purchasers to the vendors. Still less is there any such indication in the letters of October 2 and 11, 1935. I think indeed the language excludes the suggested implication. The two letters deal with an offer from Colonel Burton which is "subject to contract." That phrase is sharply contrasted with the phrase " completion of the purchase." These latter words assume at least that the stage of negotiations indicated by " subject to contract " has been successfully passed. During that stage each negotiating party is free as between himself and the other to change his mind and desist from negotiating. In particular the vendor retains the right which belongs to him as property owner to dispose of his property as he thinks fit. There is no obligation between him and the potential purchaser, assuming, what is not here in question, that he has given no binding option. He may as between himself and the other party discontinue the negotiations for any reason or want of reason however capricious or selfish. But it is said that as between himself and the agent the position is different. There is, it is said, a binding contract with the agent, and at least an inchoate right to commission in the agent who, in a case like the present, may have done everything on his part requisite to earn his commission. But even so his contract is in terms that his right to commission should depend on a particular event, namely, the completion of the sale. His claim to commission when the sale is not completed, involves the contention that the principal in virtue of the contract with the commission agent has surrendered the freedom to dispose of or retain his own property which he unquestionably enjoys vis-a-vis the other negotiating party. The commission agreement is, however, subordinate to the hoped for principal agreement of sale. It would be strange if what was preliminary or accessory should control the freedom of action of the principal in regard to the main transaction which everyone contemplates might never materialize. I cannot think that a property owner can be held, in virtue of a commission contract like this, to have bound himself by mere implication to complete the sale or to pay damages to the agent. Express words are in my opinion necessary to effect this result. Indeed the stipulation "payment on completion of purchase" is in my opinion contradictory of the implication that there is to be payment, even in the shape of damages, in the event of the sale not being completed.

The case that the suggested term is not properly to be implied becomes, in my opinion, even clearer when account is taken of some of the more general aspects of the course of business in these matters. It is well known that in the ordinary course a property owner intending to sell may put his property on the books of several estate agents with each of whom he makes a contract for payment of commission on a sale. If he effects a sale to the client introduced by one agent, is he to be liable in damages to all the others for preventing them from earning their commission ? Common sense and ordinary business understanding clearly give a negative answer. Or suppose that having employed one agent whose client has made an offer, he receives a better offer from a buyer introduced by another agent and concludes the purchase with him. It seems out of the question that he is thereby rendering himself liable in damages to the former agent. Or suppose that owing to changed circumstances he decides that he will not sell at all and breaks off negotiations with the agent's client, is he to be liable for damages to the agent ? I can find no justification for such a view. I am assuming a commission contract not containing special terms such as to impose an obligation on the vendor actually to sell through the particular agent to the potential purchaser introduced by that agent. Contracts containing such terms, though not perhaps usual, are possible. But it is said that in the absence of special terms an obligation of that nature can be implied, subject, however, to the qualification that the owner retains his freedom to deal as he likes with his own and to discontinue negotiations, but only so long as in doing so he acts with reasonable excuse or just cause. I find it impossible to define these terms in this connection. If the commission agent has a right to claim commission or damages if the vendor abandons the negotiations and does not complete the sale, his doing so is a breach of contract vis-à-vis the agent and it is immaterial to the agent how sensible or reasonable the vendor's conduct may be from his own point of view. Such a qualified implication seems to me too complicated and artificial. The parties cannot properly be supposed to have intended it, nor can it be taken to be necessary to give business efficacy to the transaction. But I do not discuss this aspect further because, as already explained, I find no basis for the implication, whether general or qualified. And the great difficulty which the Courts have found in defining or applying the idea of "just cause or reasonable excuse" further goes to show that it is not an implied term necessary to give business efficacy to what the parties must have intended. Nor is the suggested implication made more plausible by expressing it in a negative form as an implied term that the principal will not prevent the agent earning his commission. Such a term must be based upon something which under the contract the principal has agreed to do, of such a nature that failure to do it carries the consequence that the agent cannot earn the commission which would have become due if the principal had done what he had promised. For the purposes of the present problem this promise must be that he would complete the contract. Thus it all comes back to the same issue, namely, that there must be some breach of contract for which damages can be claimed. It has been said in some cases that the claim may be based on quantum meruit on the principles expounded in the notes to *Cutter* v. *Powell* (1), according to which the special contract is treated as rescinded and the agent thereupon becomes entitled to claim a partial recompense for what he has done. Such a claim is in the nature of a quasi-contractual claim. It is properly made in cases of contracts for work and labour and the like, where the employer, who has got the benefit of part performance but before full completion has repudiated the contract, may be sued either for damages for breach or for restitution in respect of the value of the part performance which he has received. Such cases are, however, obviously different from the present case. The man who engages a plumber to do some work to his house to be paid for by a lump sum thereby promises (inter alia) to give the plumber the necessary facilities to do the work so far as rests on him. That is the employer's part necessarily involved in the engagement. In the case of the commission agent, to whom payment is dependent on completion or the like condition, the principal does not promise that he will complete the contract for reasons which I have explained. His only promise is that he will pay commission if the contract is completed. There is no promise to pay a reasonable remuneration if the principal revokes the authority to the agent. And it is a further objection to a claim on a quantum meruit that the employer has not obtained any benefit. The agent has earned nothing until the event materializes. It may seem hard that an agent who has introduced a potential purchaser, able and willing to complete, should get nothing for what he has done, if, during the negotiations, the principal decides not to complete, according to his own pleasure and without any reason which quoad the agent is a sufficient excuse. But such is the express contract. And people in ordinary life do not seek the services of commission agents without a good prospect and intention of making use of them. The agent in practice takes what is a business risk. I am assuming that the commission contract is of the type exemplified in this case. The agent may, however, secure a form of contract to which what I have said does not apply. But it is necessary to reserve certain eventualities in which an agent may be entitled to damages where there is a failure to complete even under a contract like the contract in this case,

---

(1) (1795) 6 Term. Rep. 320; 2 Sm. L. C. 9: (4th ed.), 16.

For instance, if the negotiations between the vendor and the purchaser have been duly concluded and a binding executory agreement has been achieved, different considerations may arise. The vendor is then no longer free to dispose of his property. Though the sale is not completed the property in equity has passed from him to the purchaser. If he refuses to complete he would be guilty of a breach of agreement vis-à-vis the purchaser. I think, as at present advised, that it ought then to be held that he is also in breach of his contract with the commission agent, that is, of some term which can properly be implied. But that question and possibly some other questions do not arise in this case and may be reserved. Furthermore, I have been dealing with a contract in regard to the sale of real property and there may be differences where the commission agency is in regard to transactions of a different character. On the whole, however, my opinion is that the contract in question means what it says, that the simple construction is the true construction and that there is no justification for the equitable reconstruction which the Court of Appeal, following authorities which bound it, has applied. I would allow the appeal.

So far I have proceeded in what I regard as the true effect of the language of the contract, read in the light of the material facts. But I must refer to some at least of the more or less relevant cases decided before *Martyn's* case (1), and also and in particular to that case itself. In *Simpson* v. *Lamb* (2), the plaintiffs, who were clerical agents, were employed by the defendant to offer an advowson for sale on the terms that in the event of a sale being effected through their agency, the defendant would pay them a commission of 5 per cent. on the amount of the purchase money, the price authorized being 15,000*l*. The defendant, after the plaintiffs had taken certain steps to effect a sale, informed them that he had sold the advowson himself in another quarter. The plaintiffs claimed that the defendant had wrongfully revoked his authority to them to sell, which they would have done but for the wrongful revocation. At the trial Cresswell J. nonsuited

(1) [1934] 2 K. B. 436.

(2) (1856) 17 C. B. 603.

the plaintiff. He thought the defendant was perfectly entitled to sell the living himself; that it was fair to presume that the large amount of commission was taken in successful cases as a sort of compensation for the risk incurred; that the plaintiffs could not recover anything unless they sold, and that there was no wrongful revocation of the authority to sell. A rule nisi for a new trial was discharged by the Court of Common Pleas, Jervis C.J. observing in his judgment that the case was like the case of "the house-agent and the ship-broker— "the plaintiffs undertaking the business upon an under- "standing that they were to have nothing if they did not sell "the advowson; taking the chance of the large remuneration "they would have received if they had succeeded in obtaining "a purchaser." Cresswell J. observed during the argument that there was no evidence of any contract to pay a reasonable compensation if the authority to sell was revoked.

It has been held that the employment of an agent, on the term that his commission is to be payable on results, does not in general and apart from special terms deprive the employer of his freedom to dispose of his property or discontinue his business, simply because by his exercising that freedom, the agent cannot get commission. In *Rhodes* v. *Forwood* (1), the employment of a sole agent to sell the principal's coal in a certain place for a certain time was held by this House not to involve an implied condition that the business should continue to be carried on during the period named or at the place named. Lord Cairns L.C. observed that there was no express contract that the colliery owner, the employer, would send coal to Liverpool, which was the named place. He examined the contract in detail to ascertain whether there was any such implied term. On this examination he rejected the idea that the colliery owner meant to tie his hands for seven years—the specified period—against selling the colliery without either obtaining the consent of the agents or without paying them a gross sum in compensation. It all depended on the construction of the contract. On the other hand, in *Turner* v. *Goldsmith* (2), the Court of Appeal held that the contract in its

(1) (1876) 1 App. Cas. 256.

(2) [1891] 1 Q. B. 544.

express terms was a contract to employ the plaintiff for a period of five years and no term could be implied that the agreement was conditional on the continuation by the defendant of his business. The defendant was there invoking the implied term to relieve him of the effect of his express contract to employ the agent for the specified term. Again the decision depended on an analysis of the contract. A similar decision was reached in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*), *Ld.* (1). Scrutton L.J., in the course of his judgment, said (2) "The first thing is to see what the parties "have expressed in the contract; and then an implied term is "not to be added because the Court thinks it would have been "reasonable to have inserted it in the contract. A term "can only be implied if it is necessary in the business sense "to give efficacy to the contract: that is, if it is such a term "that it can confidently be said that if at the time the contract "was being negotiated someone had said to the parties "'What will happen in such a case,' they would both have "replied, 'Of course, so and so will happen; we did not trouble "'to say that; it is too clear.' Unless the Court comes to "some such conclusion as that, it ought not to imply a term "which the parties have not expressed." In *French & Co.* v. *Leeston Shipping Co.* (3) this House refused to imply in favour of a shipbroker who had procured a charterparty for a specified period under which he was entitled to 2½ per cent. commission on hire paid and earned under it, a term that the shipowner would not, during the charter period, terminate the charterparty by selling the vessel. Lord Buckmaster observed that the contract worked perfectly well without any such term being implied. Lord Sumner said (4) that to succeed the broker must show that there has been "a breach by the "(shipowner) of some obligation in his favour to be implied "from the charter. That obligation virtually is that the "shipowner will not sell his own ship during the chartered "term." He rejected the idea. "No authority," he continued, "has been produced for the implication of such a stipulation."

---

(1) [1918] 1 K. B. 592.
(2) Ibid. 605.
(3) [1922] 1 A. C. 451.
(4) Ibid. 456.

H. L. (E.)
1940
LUXOR (EAST-BOURNE), LD. v. COOPER.
Lord Wright.

These cases, no doubt, deal with a different type of commission agency, but they illustrate how essential it is to examine the express terms of the contract and how difficult it is to imply in these cases a term restricting in the interests of an agent the freedom of a principal to deal with his own property or business according to his own judgment. In *Bentall, Horsley and Baldry* v. *Vicary* (1), McCardie J. held that the appointment by a property owner of estate agents as sole agents for the sale of the property on the terms that if they introduced a purchaser they should receive commission of 5 per cent. on the purchase price did not debar the owner from himself negotiating and effecting a sale to a third person apart from the agents' intervention. As McCardie J. said, "the contract contains no express words at all indi-"cating a prohibition against a sale by the defendant himself. "If the parties intended such a prohibition nothing would "have been easier than to insert the appropriate words." In *Martyn's* case (2) all the Lords Justices approved this decision which, to my mind, is correct. In *Howard Houlder and Partners* v. *Manx Isles Steamship Co.* (3), McCardie J. had dealt with a case in which a shipbroker had effected a charter-party which contained an option to the charterer to purchase the ship for 125,000*l.*, and entitled the broker to commission on that sum should the option be exercised; the option was not exercised but, the market having fallen, shipowners and charterers agreed by a new agreement with which the brokers had nothing to do that the vessel should be sold to the charterers for 65,000*l.* McCardie J. held (rightly, as I think) that the brokers could not claim their commission on either the 65,000*l.* or on a quantum meruit. He said (4) "It is a settled "rule for the construction of commission notes and the like "documents which refer to the remuneration of an agent that "a plaintiff cannot recover unless he shows that the conditions "of the written bargain have been fulfilled. If he proves "fulfilment he recovers. If not, he fails. There appears "to be no half-way house, and it matters not that the plaintiff

(1) [1931] 1 K. B. 253.
(2) [1934] 2 K. B. 436.
(3) [1923] 1 K. B. 110.
(4) Ibid. 113.

"proves expenditure of time, money and skill." The learned judge quoted a number of cases in support of that proposition which would apply equally to an oral agreement.

I ought to refer to two cases in the Court of Common Pleas, which have been cited in support of the respondent's claims. The first is *Prickett* v. *Badger* (1). That case is said to establish a general proposition that where an agent is employed at an agreed commission to sell land and succeeds in finding a person able and willing to purchase at the stipulated price, but the employer declines to sell and rescinds the agent's authority, the latter is entitled to sue on a quantum meruit for his work and labour on the ground that the performance of the contract was prevented by the wrongful act of the defendant. I presume that the contract is one which makes sale a condition of the agent's right to payment. This proposition obviously presupposes that under the contract between the agent and the principal the latter had bound himself to sell to the purchaser found by the agent. That this is so seems to follow from the citation by the Court of *Planché* v. *Colburn* (2), where the plaintiff had been employed to write a treatise for periodical publication but the defendant had abandoned the project and had repudiated the contract so that the plaintiff was entitled to claim damages, or to claim on a quantum meruit. In *Prickett's* case (1) it is not easy to find out what the contract was. It was oral, but Williams J. states the agent's obligation to have been to find a purchaser (by which is meant presumably a person able and willing to purchase) at the price named, which he did. If that was all, and if there was no condition that there should be an actual purchase, it would seem to follow that the plaintiff was entitled to get the whole agreed commission. But he only claimed for work and labour and on an account stated. The jury gave him 50*l.* against his claim for 143*l.* 5*s.* The defendant appealed on the ground that the plaintiff could not resort to the common counts for work and labour, but could only claim on the special contract which, the defendant contended, was that the plaintiff was to receive commission if he succeeded in effecting a sale, but if

(1) 1 C. B. (N. S.) 296.

(2) (1831) 8 Bing. 14.

not was to get nothing. The Court rejected this contention, Williams J. saying that the plaintiff had actually found a person who was willing to become a purchaser at a price exceeding the price demanded and was only prevented from carrying out the negotiations because of the defendant's inability to convey. The defendant's appeal was dismissed, but a new trial was ordered in favour of the plaintiff on the ground that the damages awarded were inadequate. Williams J. is careful to say that in the ordinary case an agent seeking to rely on a quantum meruit would be met by what he calls "the implied understanding that the agent is only to receive "a commission if he succeeds in effecting a sale, but if not then "he is to get nothing." I think it would be dangerous to treat this decision as laying down any general principle, let alone the wide rule which, as I have stated above, it was contended was embodied in it. I treat it as a decision on its special facts, and on the manner in which the plaintiff had formulated his claim.

A later case cited was *Inchbald* v. *Western Neilgherry Coffee Co.* (1). In that case the plaintiff, a member of the Stock Exchange, had been appointed as stockbroker to the defendant company to sell their shares on the terms that he was to receive 100*l.* down and 400*l.* more on the allotment of the whole of the shares of the company. The company had been formed to purchase a tea estate, but it later appeared that the owner of the estate refused to sell. The directors then decided to wind up the company. At that time all the shares had not been allotted. No one could say that the directors were acting improperly in winding up the company. It was held, however, that the plaintiff was entitled to recover the 400*l.* less an allowance for the risk. I cannot understand this decision except on the ground that the case was treated as analogous to a case of wrongful dismissal. This would pre-suppose that the plaintiff was employed to sell all the shares, and that the company engaged that he should do so. Willes J. said (2) that the company was bound to fulfil its engagement in substance. He instanced the case in Bulstrode of a person who sold a horse but poisoned him before delivery. There was clearly in that case a breach of contract. Willes J. went on to say (1), "I apprehend that wherever money is to be paid by one man "to another upon a given event, the party on whom is cast the "obligation to pay is liable to the party who is to receive the "money, if he does any act which prevents or makes it less "probable that he should receive it." No one, I imagine, would deny that this statement is too wide unless Willes J. is referring to prevention by an act which is a breach of the contract between the parties. That would be the case if there was a positive engagement of the plaintiff to sell all the shares, in which event the case would be analogous to *Turner* v. *Goldsmith* (2). I cannot attribute to so accurate a judge as Willes J. any such general meaning as has sometimes been attributed to his words. Byles J. thus sums up the position (3): "They (the directors) have broken their contract and the plaintiff "must be compensated for it." When a defendant is charged by a plaintiff with having prevented the plaintiff from fulfilling a condition on which his right to payment depends, it must, in my opinion, be shown that the defendant's act which prevented, was wrongful, and the wrong would be generally a breach of the contract. Thus in *Mackay* v. *Dick* (4), the maker of an excavating machine was required by the contract to send the machine for the purpose of being tested to the railway cutting which the buyer was engaged in constructing, and the buyer was only to be liable to pay for it if it there in working satisfied the test. This House held that the buyers had prevented fulfilment of the condition because they held that, it being the buyer's duty under the contract to provide the necessary facilities, he had failed to do so. Hence his default prevented the seller from satisfying the condition. The seller could therefore say that he had done all that lay on him to fulfil the condition and was to be taken to have implemented it. The test was only not satisfied because of the buyer's default. Thus when it is said in the present case that the appellants prevented the respondent from completing the contract it must be shown that the appellants broke some term of the contract between them and the respondent. The appellants cannot be held liable on the ground of prevention where all that happened was that they did, or omitted to do, something which as between themselves and the respondent they were free to do or omit to do. I question if there is any exception to this principle, but I am clear that there is no exception material to this case. Since, in my opinion there was no such implied term as the respondent claims, there can be no case of prevention rendering the appellants liable.

---

(1) 17 C. B. (N. S.) 733. (2) Ibid. 741.

---

(1) 17 C. B. (N. S.) 733, 741.

(2) [1891] 1 Q. B. 544.

(3) 17 C. B. (N. S.) 742.

(4) 6 App. Cas. 251.

I have emphasized this matter because I think my divergence from the view of the majority in *Martyn's* case (1) in substance depends on my inability to agree with them that it was legitimate to introduce the implied term which they introduced into the contract and upon which they based their decision that there was a prevention by the appellants of the completion of the contract. The somewhat elaborate exposition which I have made of my views on the whole topic, relieves me from repeating why with the utmost deference I have felt constrained to differ from their decision in *Martyn's* case (1). On the other hand, Scrutton L.J., in his dissenting judgment, with which I agree, rejected the implied term and held that there was no wrongful act of the employer which prevented the condition of completion being fulfilled. I take it that Scrutton L.J. meant an act which was wrongful under the contract between the appellants and the respondents. There could be no wrongful act as between the employer and the prospective purchaser in breaking off the negotiations while they were going on "subject to contract" and no wrongful act thereby, in my opinion, as between the appellants and the respondent for the reasons I have attempted to state. It may well be, as I have already stated, that as soon as a binding executory contract is effected between the employer and the purchaser, a different state of things arises. The property is transferred in equity and the seller can be specifically ordered to complete. The agent may then fairly claim that he is entitled to his commission or at least to substantial damages and a term of that nature may, I think, as at present advised be implied in the contract. It cannot have been contemplated that when a binding contract with the purchaser has been made on the agent's mediation, the principal can as between himself and the agent break that contract without breaking his contract with the agent. I understand that this was the view of Scrutton L.J., and though the question does not arise in this case, I am as at present advised in agreement with it. In that case it may fairly be said that the employer prevented the fulfilment of the condition and was in default under the commission agreement just as much as under the agreement of sale. But while negotiations are still in progress, it is a different matter.

---

(1) [1934] 2 K. B. 436.

It may be said that on the view of Scrutton L.J., and on the view which I have been propounding, the prospect of the agent getting his reward is speculative and may be defeated by the arbitrary will of the principal. That may perhaps be so in some cases. But it is I think clear that under a contract like the present the agent takes a risk in several respects; thus, for instance, the principal may sell independently of the agent to a purchaser other than the purchaser introduced by him, or where the employment is not as sole agent, he may sell through another agent. Why should not the agent take the chance also of the employer changing his mind and deciding not to sell at all? It is said that according to the term which, it is suggested, should be implied he can change his mind if he has a reasonable excuse or just cause. But then why should his freedom to dispose of his property be fettered even in this way? And what is a reasonable excuse or just cause? Is it to be decided from the point of view of the owner or from the point of view of the commission agent? It is just the difficulty of applying these vague phrases which has already led to so much litigation on this question. In my opinion the implied term is unworkable. Even in this case Branson J. has taken one view and the Court of Appeal another. If the suggested implied term is discarded, a contract such as the present will be simple and workable. Commission agents may sometimes fail to get the commission that they expected, but they will be relieved from disputes and litigation. And they can always, if they desire, demand what they consider a more favourable form of contract.

I have not referred to all the cases which have been cited to your Lordships. Many are ill reported; many reports are deficient in stating the essential factor, which is the exact language of the contract. They are sufficiently discussed in the judgment of Scrutton L.J., whose statement of their effect I substantially accept. They give on the whole little guidance on matters of principle. The two decisions in the Court of Appeal which intervened between *Martyn's* case (1) and the present appeal follow *Martyn* (1) and are occupied with the question of what constitutes just cause or reasonable excuse in the particular cases.

For these reasons I concur in the motion proposed by my noble and learned friend on the Woolsack.

LORD ROMER. My Lords, the respondent's claim in this case must necessarily be based upon the oral agreement that was come to between himself and Garton on September 23, 1935; for there is no trace to be found of any other agreement between the parties, the letter of October 11 from Garton's firm to Ewbank not purporting to be anything more than a confirmation of the oral agreement already arrived at. It is, to say the least of it, very doubtful whether Garton had any authority to make the agreement on behalf of the appellant companies, but I am willing for the purposes of this appeal to assume that he had, or that the agreement was subsequently ratified by them. What then were its terms? The evidence upon this question is meagre and unsatisfactory. The agreement was made at an interview on September 23, at which Garton, the respondent and Ewbank were present. According to Ewbank all that took place was that Cooper told Garton that he wanted a commission of 10,000*l.* and that Garton agreed to the figure. The respondent in his evidence was a little more explicit. His account of the interview was as follows: " I told Garton that I had a friend who was prepared

---

(1) [1934] 2 K. B. 436.

H. L. (E.)

1940

LUXOR (EASTBOURNE), LD. v. COOPER.

Lord Romer.

"to negotiate, and we discussed the price, and I told him I "expected to get a commission. He told me the lowest price "that they would take, and any commission I got would "have to be added to that price. The price he gave me was "175,000*l.* I said I was going to add 10,000*l.* to it. He "said, 'As long as the purchasers do not object, I do not "'mind'." Garton was not called. It will be observed that neither Ewbank nor the respondent states in terms what was agreed as to the time when, and the event in which, the commission was to become payable. But the letter from Garton & Co. to Ewbank on October 11 confirming the terms of the oral agreement makes it clear that it was a term of that agreement that the commission was only payable upon completion of the sale of the cinemas to the persons introduced by the respondent, and was to be paid by the appellant companies in equal shares. It would seem therefore that the agreement come to was this: That if the respondent should introduce some person or persons who should purchase the cinemas for a price not less than 185,000*l.*, the respondent should be paid out of the purchase money on completion a commission of 5000*l.* by each of the appellant companies.

Such being the agreement entered into between the parties it is plain that the appellants committed no breach of its express terms when they broke off the negotiations with the company introduced by or through the respondent as the proposed purchaser of the four cinemas. The sale to it of the cinemas never materialized and the agreed commission never became payable to the respondent. This, indeed, is admitted by the respondent. What he does contend is that in breaking off the negotiations the appellants committed a breach of an implied condition of the agreement. Mr. Cartwright Sharp in arguing on behalf of the respondent seemed, I thought, to find some difficulty in formulating the exact terms of this implied condition, but eventually he pinned his faith to the principle of law set out in para. 2 of the respondent's printed case, a proposition which is there alleged to have been established by the decision of the Court

H. L. (E.)
1940
LUXOR (EAST-BOURNE), LD. v. COOPER.
Lord Romer.

of Appeal in *Trollope & Sons* v. *Martyn Brothers* (1). It is this, " Where an owner of property employs an agent to find "a purchaser, it is an implied term of the contract of agency "that after the agent has introduced a ready and willing "purchaser at a price nominated or assented to by the principal "the principal shall not exercise his right as far as the intending "purchaser is concerned to refuse to continue with the "negotiation or to complete the sale without 'just excuse' or " 'reasonable cause'." In point of fact the case of *Trollope & Sons* v. *Martyn Brothers* (1) did not go so far as indicated in this proposition. For in that case the intending purchaser was not only ready and willing to pay the price stipulated for by the vendors, he was also ready and willing to sign a contract that contained substantially all the terms and conditions that the vendors desired. But however this may be, it is plain that the present case does not come within the principle so formulated. The respondent was not employed by the appellants to find a purchaser. He was not employed to do anything at all, and would have committed no breach of his agreement with the appellants had he remained entirely inactive. There was no " contract of agency." If A and B agree that B shall do some work for A for reward, it is no doubt an implied condition of the agreement that A shall not prevent B from performing his part of the contract, i.e., doing the work and so earning his reward. But I can see no ground whatsoever for implying any such condition where B is under no contractual obligation to do the work but has merely been promised by A a reward in the event of his doing it. If B is under no obligation to do the work, why should A be under an implied obligation not to prevent him doing it ? In a case of this sort B will lose the reward should he fail for any reason to do the work. It is the risk that he runs and that he must be taken as being willing to run. I can find no reason for thinking that in such a case it matters in the least whether B's failure to do the work is due to his own volition or to some act on the part of A. And I may here observe that in *Trollope & Sons* v. *Martyn Brothers* (1) the plaintiffs had been

(1) [1934] 2 K. B. 436.

"instructed" by the defendants to find a purchaser for the defendants' property. This appears from the statement of facts set out in the report (1). It also appears from the judgments of Greer L.J. and Maugham L.J. The former (2) described the plaintiffs' claim as being one for commission arising by reason of their "employment" by the defendants as their agents for sale of the property there in question. The letter (3) referred to the plaintiffs as having been "employed" by the defendants.

But supposing that a contract by one person to pay another a sum of money in the event of the latter performing an unsolicited service to the former is as much subject to an implied condition as if the latter had been employed to perform the service, the condition is in general one that merely imposes on the former a negative and not a positive obligation. If I employ a man for reward to build a house on my land I subject myself to an implied condition that I will do nothing to prevent him carrying out the work. But I am under no implied obligation to help him earn the reward whether by the supply of building materials or otherwise. But there are exceptional cases where in a contract of employment the employer is under a positive obligation. If, for instance, I employ an artist to paint my portrait I subject myself to the positive obligation of giving him the requisite sittings. The question, then, to be determined upon the hypothesis that I mentioned just now is this: Where an owner of property employs an agent to find a purchaser, which must mean at least a person who enters into a binding contract to purchase, is it an implied term of the contract of agency that, after the agent has introduced a person who is ready, willing and able to purchase at a price assented to by the principal, the principal shall enter into a contract with that person to sell at the agreed price subject only to the qualification that he may refuse to do so if he has just cause or reasonable excuse for his refusal? This qualification must plainly be added, for the respondent does not contend, and no one could successfully contend, that the obligation of the principal to enter into a contract is an unconditional one.

---

(1) [1934] 2 K. B. 437.
(2) Ibid. 446.
(3) Ibid. 453.

In my opinion the question must be answered in the negative. Any such implied condition would be either wholly unreasonable or it would be void for uncertainty. If it means that the employer is to enter into a contract on such terms as the purchaser may require it is obviously unreasonable. If it means that the contract is to contain such terms as to commencement of title, date of completion, requisitions, restrictive covenants and so forth as may be just and reasonable it would be void for uncertainty. For who can possibly judge what in such a case is just and reasonable as between the employer and the agent? Because it is the position as it affects the agent that would have to be considered. Nothing for which the vendor might stipulate as to the terms of the contract could be considered unjust or unreasonable as between him and the purchaser. Take the present case. The offer of the proposed purchaser introduced by the respondent purports to have been accepted by the directors of the appellant companies at a board meeting held on October 2, 1935. As all the directors were personally interested in the matter the resolution passed was a nullity. But even if it bound the appellants the acceptance of the offer resolved upon was an acceptance "subject to contract." The object of inserting these words in an acceptance is well known. It is to save the vendors from being bound by an "open contract" and leaves them at liberty to insist on such terms being embodied in the contract as they may think right. If the respondent's contention be right, however, the appellants were under an implied obligation to insert only such terms as might eventually be held by some unspecified tribunal to be just and reasonable as between them and the respondent. The contention, I confess, appears to me to be utterly absurd. My Lords, it must not be thought that in saying this I am guilty of any disrespect to the learned judges who formed the majority of the Court in *Martyn's* case (1). What they actually decided was that inasmuch as the agents had introduced a person who was prepared not only to purchase at the price stipulated for by the vendors but to enter into a contract containing substantially every term and condition that they required, the vendors were, unless they could show some just and reasonable cause for not doing so, under an implied obligation to sign that contract and so enable the agents to earn the agreed commission. Whether that case was rightly decided or not is a question that I do not find it necessary to determine. It is sufficient to say that it does not cover the present one. Nor in truth did it cover the subsequent case of *Trollope & Sons* v. *Caplan* (1), a case that in my opinion was wrongly decided.

---

(1) [1934] 2 K. B. 436.

It only remains to say a few words about the case of *Prickett* v. *Badger* (2), on which the respondent placed much reliance. In that case the defendant had employed the plaintiff to find a purchaser for some land. The plaintiff thereupon prepared a plan of the land, issued advertisements, wrote letters to and had personal interviews with a number of people. Eventually he found a person who was ready, willing and able to buy the land. The defendant then disclosed for the first time the fact that he had no title to the land. The Lord Chief Baron directed the jury that in these circumstances the plaintiff was entitled to be paid by the defendant a reasonable remuneration for his services—in other words a quantum meruit. On appeal it was held that the direction was right. Crowder J. said that a contract was implied by law to pay the plaintiff a reasonable remuneration for his labour, and Willes J. agreed. The case is no authority in support of the respondent's claim in the present case, even if in view of later decisions it is to be regarded as good law.

In my opinion, for the reasons that I have given, this appeal should be allowed, and I concur in the motion now before your Lordships' House.

Appeal allowed.

Solicitors for appellants: *H. S. Wright & Webb.*
Solicitors for respondent: *Mayo, Elder & Co.*

---

(1) [1936] 2 K. B. 382.

(2) 1 C. B. (N. S.) 296.

Referred to. HART *v.* GRIFFITHS-JONES. [1948] 2 All E.R. 729.

Referred to. BISHOP *v.* CUNARD WHITE STAR, LTD. [1950] 2 All E.R. 22.

Applied. BISHOP *v.* CUNARD WHITE STAR Co. [1950] P. 241

[HOUSE OF LORDS.]

BENHAM . . . . APPELLANT;

AND

GAMBLING . . . . RESPONDENT.

H. L. (E.)*

1940

Oct. 31;
Nov. 1, 4;
Dec. 16.

Damages—Negligence—Death of injured child—Shortening of expectation of life.

Damages given for the shortening of life should not be calculated solely, or even mainly, on the basis of the length of life that is lost; they should be fixed at a reasonable figure for the loss of a measure of prospective happiness. If, however, the character or habits of the deceased were calculated to lead him to a future of unhappiness or despondency that would be a circumstance justifying a smaller award. No regard must be had to financial losses or gains during the period of which the victim has been deprived, damages being awarded in respect of loss of life, not of loss of future pecuniary prospects. In the case of a child, as in the case of an adult, the proper sum to be awarded should not be greater because the social position or prospect of worldly possessions is greater in one case than another.

Damages in respect of the death of an infant child reduced from 1200*l*. to 200*l*.

APPEAL from a decision of the Court of Appeal.

The respondent was the father and was constituted the administrator of the estate of his infant child of two and a half years who, while a passenger in a motor car, was so injured by that car being run into and overturned by a car driven by the appellant that he died the same day. In respect of the death of the child the respondent brought an action against the appellant claiming damages. At the trial at Winchester Assizes the negligence of the appellant was admitted and the sole question for decision was the amount of damages to be awarded to the respondent as administrator for the benefit of the child's estate. It appeared that the child was unconscious from the moment of the accident till his death.

Asquith J., sitting without a jury, had before him, with the assent of counsel on both sides, the tables of expectation of life

---

* *Present:* VISCOUNT SIMON L.C., VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

H. L. (E.)
1940
BENHAM
v.
GAMBLING.

prepared by the Registrar-General, and according to these, a newly born child has an expectation of life of about 58 years, but the judge said that this statistical material was "not real "evidence in a matter of this kind." On a consideration of the evidence the judge fixed the damages at 1200*l.*, having arrived at the conclusion that this amount was "neither "unreasonably excessive nor unreasonably deficient." On appeal Slesser L.J. and MacKinnon L.J. held that the award of 1200*l.* should stand, while Goddard L.J. considered that the amount should be reduced to 350*l.*

The defendant appealed to this House.

N. L. C. Macaskie K.C. and *Humfrey Edmunds* for the appellant. Two questions arise in this appeal—(*a*) on what principle should the Court assess damages for the death of a child of two and a half years of age, and (*b*) whether Asquith J. was right in holding that the greater the shortening of the expectation of life the greater the loss and the greater enhancement of the amount of damages. This child of two and a half years had not, and could not have, any appreciation of the value of the happiness of life. That must be borne in mind. Since the decision in *Rose* v. *Ford* (1) the amounts that have been awarded in such cases have varied enormously even when the age of the person has been three or four. In *Rose* v. *Ford* (1) in respect of the death of a young woman, twenty-three years of age, a sum of 1000*l.* was awarded, and it is said that in respect of a younger person something more should be added.

In several of the cases the judges have adopted the lengths of the expectation of life as the basis of calculation: see *Bailey* v. *Howard* (2) where 1000*l.* was awarded by the jury in respect of a death occasioned by the negligence of the defendant. There the Court of Appeal said that no quantitative scale for the damages could be arrived at, but that the matter must be left to the good sense of the jury. The Court of Appeal there decided that as the jury, after a proper direction, found a verdict for 1000*l.*, it was not possible to say that

(1) [1937] A. C. 826.

(2) [1939] 1 K. B. 453.

that sum was one which the jury as reasonable persons could not have arrived at.

In *Shepherd* v. *Hunter* (1) the Court of Appeal held that an award of 90*l.* in respect of a child aged three who was killed in a road accident was clearly erroneous and a new trial was ordered. The sum awarded must no doubt be reasonable, but here it was not reasonable in that it was so excessive. The judge, we submit, did not take into consideration the possibility of a short life or a maimed life for the child, by illness or anxieties. At the age at which this child was killed there could be no appreciation by him of life as a good thing. In any view the sum awarded was excessive.

[They also cited *Ellis* v. *Raine* (2); and *Roach* v. *Yates* (3) was also referred to.]

Cecil R. Havers K.C. and *E. Gilbert Woodward* (for *Malcolm McGougan*, absent on war service) for the respondent. One of the elements to be considered in cases of this kind is the age factor; less being given where the person has a short expectation of life, and more when the person has a long expectation. The age factor is, however, only one of the elements to be considered. Moreover, no assumption can be made in favour of the wrongdoer. As Lord Roche said in *Rose* v. *Ford* (4) "it was quite correct, where obviously the principal element "was that the expectation of life was cut down so greatly, "to treat that as the main matter." It is said for the appellant that a child of tender years is in a state of permanent unconsciousness and therefore no more than nominal damages should be awarded. That cannot be right. In the Scottish case of *Reid* v. *Lanarkshire Traction Co.* (5), Lord Blackburn said that "The fixing of the damages payable to the executor "of an injured person who has initiated a claim for reparation "before his death must always raise questions of difficulty, "for it is almost impossible to estimate the value which life "may have had to a person who has been deprived of it. But, "whether the case be tried with or without a jury, I think the

---

(1) [1938] 2 All E. R. 587.
(2) [1939] 2 K. B. 180.
(3) [1938] 1 K. B. 256.
(4) [1937] A. C. 826, 861.
(5) 1934 S. C. 79, 84.

H. L. (E.)
1940
BENHAM
v.
GAMBLING.

"amount of compensation awarded should be allowed to stand "unless it appears that it is either extravagantly large or "extravagantly small." As was said in *Ball* v. *Ray* (1), by a Court consisting of Lord Selborne L.C., James and Mellish L.JJ., where it is not shown that the Court below acted on any wrong principle in arriving at the amount of damages, that amount should not be interfered with. Here there was no reason for not applying the rules for ascertaining the normal duration of life. It cannot be said that the life of a child of this age is of no or little value.

N. L. C. Macaskie K.C. in reply. Regard must be had to the uncertainties of life and to these the judge did not have regard. The judge ignored that very important fact and the complete uncertainty as to the kind of life it would have had to face. These questions have to be taken into account in estimating the amount of damages to be awarded, and in this case were not sufficiently considered.

The House took time for consideration.

1940. Dec. 16. VISCOUNT SIMON L.C. My Lords, under the common law of England it was the general rule that no executor or administrator could sue, or be sued, for any tort committed against or by the deceased in his lifetime. Such was the actual purport of the maxim "actio "personalis moritur cum persona"—a maxim which is both obscure in origin and inaccurate in expression, for the proposition that personal actions abate with the death of either party is, of course, not true, generally speaking, of causes of action arising out of contract. The common law rule was subject to important exceptions, some of them admitted by the common law itself and others introduced by statute. But the rule itself was in effect swept away by the Law Reform (Miscellaneous Provisions) Act, 1934, which provides, subject to important exceptions which do not however affect the present appeal, that on the death of any person after the commencement of the Act all causes of action

---

(1) (1874) 22 Weekly Reporter 283.

H. L. (E.)
1940
BENHAM
v.
GAMBLING.
Viscount Simon L.C.

vested in him shall survive for the benefit of his estate. Accordingly, if an individual is injured by accident due to the negligence of another person, the claim for damages no longer abates at his death, but survives for the benefit of his estate and can be enforced in an action brought by his personal representative against the negligent defendant or against the defendant's personal representative if the defendant has died, since the Act also provides for the survival of such a claim against the defendant's estate.

This is so, of course, whatever may have been the cause of the plaintiff's death. But, for the purpose of solving the problem which this appeal presents, we have to consider more particularly the situation which results under the Act of 1934 if the injuries, for which the defendant is responsible, are so severe that the victim dies of them before action brought, or at any rate before judgment. In *Flint* v. *Lovell* (1) the Court of Appeal recognized the validity of a claim, made by a living person, for damages in respect of the prospective shortening of his own life due to the defendant's negligence. *Flint* v. *Lovell* (1) was approved by this House in *Rose* v. *Ford* (2). This latter case arose out of an accident, which terminated fatally, after the commencement of the Law Reform (Miscellaneous Provisions) Act, 1934, and it followed that this element of damages, which is often described as "loss of expectation of "life," could not be confined to the case where the injured person was alive at the date of the action, but must be equally admissible if the action is brought by his personal representative.

It has been recognized by judges, who have had to deal with the many cases under this head which have fallen to be decided in the last few years, that the measurement of this head of damage in terms of money is a very difficult matter, and the House has been furnished with the assent of both parties to this appeal, with a list of cases already decided (some of them appearing in the Reports, and others available only in shorthand notes), which show how wide is the variation between the judgments of different tribunals of fact in assessing, under comparable circumstances, a suitable figure of loss under this

(1) [1935] 1 K. B. 354. (2) [1937] A. C. 826.

head. None the less, it must be accepted that, in cases where the victim's life has been shortened by the accident and the claim is properly formulated and proved, some figure to represent the loss suffered by the deceased through the shortening of his life may be included in the damages, and several of the judges concerned have drawn attention to the need for authoritative guidance on the subject of how to arrive at it. In *Rose* v. *Ford* (1) the amount awarded on his head was 1000*l*. in respect of a young woman of 23, who was for the most part unconscious after the accident occurred and who succumbed to her injuries four days later, but in *Rose* v. *Ford* (1) no issue arose before your Lordships' House on the question of amount. The present appeal raises the problem of the assessment of damage for "loss of expectation "of life" before this House for the first time, and it is indeed the only issue with which we are now concerned.

The action rose out of a motor car accident which occurred on June 1, 1938. The respondent is the father, and was constituted the administrator of the estate, of an infant, who at the time of the accident was two-and-a-half years old. The appellant, in attempting to drive his car past another car in which this infant was one of the passengers, caused the latter car to overturn and the infant was so severely injured that he died on the same day. At the trial before Asquith J., sitting without a jury at Winchester Assizes, the negligence of the appellant was admitted and the only question for the learned judge to decide was the amount of damages to be awarded to the administrator for the benefit of the child's estate. Since the child was unconscious from the moment of the accident till his death, there could be no claim for pain and suffering, and the only question, apart from funeral expenses, was that of damages arising from the diminution of the child's expectation of life. The child was a normal healthy child, living in a country village off the main road, where the risk of being exposed to road dangers and to certain diseases would be less than in a crowded centre. His father was in steady employment and had reasonable prospects of continuing in it. The learned judge summed up his view of these facts by saying that the child was "living in modest but otherwise favourable "circumstances in a village, the father having been in continuous employment for fifteen years."

---

(1) [1937] A. C. 826.

Asquith J. had before him, with the assent of counsel on both sides, the tables of expectation of life which are periodically prepared by the Registrar-General. According to these tables a newly born child has an expectation of life of about 58 years; a child of 10, of 55 years, and a young person of 20, of 46 years. For reasons which I shall state, I do not think that this statistical material is of assistance in such a case as the present, and indeed the learned judge correctly observed that the tables "are not really evidence in a matter of this kind." The judge was referred to a number of earlier decisions in which various amounts had been awarded, on no clearly defined principle, in respect of individuals of various ages, and observed that these decisions appeared to proceed on the basis "that human "life must be assumed on the whole to be an advantage rather "than a disadvantage, and if the victim has had its life "reduced by a longer period, that is a graver disadvantage in "respect of which larger damages ought to be awarded than if its "life had been reduced by a shorter period." As against this, the judge pointed out that some of the decisions implied "that there are some factors which are assumed to operate "the other way and which ought to be set off. In particular, "there are some respects in which a young child, say under "ten, is more helpless and more liable to physical accident "than an older child or an adult who can look after themselves. "Again, it seems to be hinted, not very clearly, in one or two "cases, that the value to an infant of those years of its life "when it is a very small infant is smaller than the value to it "of the later years of its life; and seeing that the child, up "to the age of four or five can hardly be said to have a coherent "and continuous self-consciousness, it does seem to me that "those early years are of less value to it than the later years "would have been if it had lived to attain them."

The learned judge fixed the damages at the sum of 1200*l.*, having arrived at the conclusion that this amount would, in the circumstances, "be neither unreasonably excessive nor "unreasonably deficient."

The defendant appealed to the Court of Appeal. Slesser L.J. and MacKinnon L.J., for somewhat different reasons, held that the award of 1200*l.* should stand; Goddard L.J. thought that the appeal should be allowed and the amount reduced to 350*l.* Slesser L.J. referred to and discussed a passage in the speech of my noble and learned friend, Lord Wright, in *Rose* v. *Ford* (1), which runs as follows: "I "think both on principle and on authority this element of "damage, that is, for the shortening of life or for the loss "of the normal expectancy of life, was properly taken into "calculation in *Flint* v. *Lovell* (2) and should be considered "here, as Greer L.J. thought. The jury should be directed "that they are entitled to take it into consideration, along "with other relevant elements of damage, using their "common sense to give what is fair and moderate, in "view of all the uncertainties and contingencies of human "life. Special cases may occur, such as that of an infant "or an imbecile or an incurable invalid or a person involved in hopeless difficulties. The judge or jury must "do the best they can in the circumstances in this as in "other cases."

The Lord Justice interpreted Lord Wright's reference to the infant (correctly in my opinion) as meaning that while, ceteris paribus, the injury inflicted by shortening life may be supposed to be greater in the case of youth than in the case of age, this simple test could not be applied without qualification when dealing with a young child. The Lord Justice, however, basing himself to a large extent on the award of 1000*l.* in the case of a child of three years of age in *Bailey* v. *Howard* (3), took the view that the damages in the present case should not be disturbed or re-assessed. MacKinnon L.J. in effect declared that he regarded the problem set as insoluble and, therefore, found himself unable to affirm that the figure arrived at should be varied. "The utmost that I can arrive

---

(1) [1937] A. C. 826, 849.
(2) [1935] 1 K. B. 354
(3) [1939] 1 K. B. 453.

"at," he said, "is that if 1000*l.* was right in *Rose* v. *Ford* (1), "the case of the girl of 19 or 20" (she was really 23), "then it "looks as though 1200*l.* for this child of two and a half was too "much. But I still find myself in the position of being "compelled to say, I cannot say that 1200*l.* is too much, "because I have no idea what the proper figure is." Goddard L.J., on the contrary, considered that the damages were extremely high and indeed excessive. He pointed out the extreme difficulty of fixing a figure representing a solatium due to a person who is dead, and he construed the dictum in Lord Wright's judgment, to which I have referred, as meaning in the case of a dead infant "that you should take that" (i.e., the fact that the deceased is a very young child) "into account "by way of minimising the damage." The Lord Justice continued: "With an infant you do not know that its parents "will live or that it will have any education. It is far more "exposed to certain dangers, and so forth, and it is altogether "far more difficult with a baby of a few months, or even a few "years, it seems to me, to come to a fair sum than in the case "of another person. Certainly I should feel that in such a "case any estimate based upon the probable length of life was "entirely fallacious," and the Lord Justice reached the conclusion that there is no principle upon which such damages can be assessed "beyond saying that you are to give what is fair "and moderate and to use your common sense." He gave it as his opinion that 350*l.* would be a reasonable sum in all the circumstances.

The House is now set the difficult task of indicating what are the main considerations to be borne in mind in assessing damages under this head and, in the event of its differing from the view taken in the Courts below, of deciding whether this difference is of a kind which would justify interfering with the figure of 1200*l.* fixed by the learned judge.

In the first place, I am of opinion that the right conclusion is not to be reached by applying what may be called the statistical or actuarial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at from a vast mass of vital statistics; the figure is not necessarily one which can be properly attributed to a given individual. And in any case the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life. The age of the individual may, in some cases, be a relevant factor. For example, in extreme old age the brevity of what life may be left may be relevant, but, as it seems to me, arithmetical calculations are to be avoided, if only for the reason that it is of no assistance to know how many years may have been lost, unless one knows how to put a value on the years. It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation, to be paid to the deceased's estate, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures—all that makes up "life's fitful fever"—have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life that is lost. Asquith J. appreciated this view, as his judgment shows, but I think that, in the light of the large amounts awarded in some previous cases in respect of quite young children, the figure he arrived at was unduly swollen by the consideration that the child might otherwise have had many years of life before it.

---

(1) [1937] A. C. 826, 849.

The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a Court of law, but in view of the earlier authorities, we must do our best to contribute to its solution. The learned judge observed that the earlier decisions quoted to him assumed "that human life is, on the whole, good." I would rather say that, before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award. It is significant that, at any rate in one case of which we were informed, the jury refused to award any damages under this head at all. As Lord Wright said in *Rose* v. *Ford* (1) special cases suggest themselves where the termination of a life of constant pain and suffering cannot be regarded as inflicting injury, or at any rate as inflicting the same injury as in more normal cases. I would further lay it down that, in assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness ; the test is not subjective and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects.

The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects—having passed the risks and uncertainties of childhood and having in some degree attained to an established character and to firmer hopes—his or her future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable. I would add that, in the case of a child, as in the case of an adult, I see no reason why the proper sum to be awarded should be greater because the social position or prospects of worldly possessions are greater in one case than another. Lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status.

---

(1) [1937] A. C. 826.

It remains to observe, as Goddard L.J. pointed out, that, stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth, of course, is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead me to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, very moderate figures should be chosen. My noble and learned friend Lord Roche was well advised when he pointed out in *Rose* v. *Ford* (1) the danger of this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award.

My Lords, I believe that we are all agreed in thinking that the proper figure in this case would be 200*l*., and that even this amount would be excessive if it were not that the circumstances of the infant were most favourable. In reaching this conclusion, we are in substance correcting the methods of estimating this head of loss, whether in the case of children or adults, which have grown up in a series of earlier cases, and which Asquith J. naturally followed, and are approving a standard of measurement which, had it been applied in those cases, would have led, at any rate in many of them, to reduced awards. I trust that the views of this House, expressed in dealing with the present appeal, may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy.

My Lords, my noble and learned friend, Lord Romer, who is not able to be present here to-day, authorizes me to say that he agrees with this opinion.

VISCOUNT MAUGHAM. My Lords, I entirely agree.

---

(1) [1937] A. C. 826.

LORD RUSSELL OF KILLOWEN. My Lords, I also concur.

LORD WRIGHT. My Lords, I also agree.

LORD PORTER. My Lords, I also agree.

Appeal allowed and judgment entered for plaintiff for 200*l.*

Solicitor for appellant: *C. Howe Browne.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey, for Talbot & Davies, Andover.*

Distinguished. TURBURVILLE *v.* WEST HAM CORPN. [1950] 2 All E.R. 54.

[HOUSE OF LORDS.]

H. L. (E.)* GRIFFITHS AND ANOTHER . . . . . APPELLANTS;

1940

AND

Sept. 17, 19; Dec. 12.

SMITH AND OTHERS . . . . RESPONDENTS.

Considered. FIRESTONE TIRE AND RUBBER CO. (S.S.) LD. *v.* SINGAPORE HARBOUR BOARD [1952] A.C. 452

Public authorities protection—Limitation of time for bringing action—Managers of non-provided elementary school—Exhibition of pupils' work on school premises—Invitee injured by collapse of floor—Managers a "public authority"—Action not commenced within six months—Public Authorities Protection Act, 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1.

The managers of a non-provided public elementary school, a statutory body created by the Education Acts, issued invitations to, among others, the appellant to attend an exhibition on the school premises of work done by the pupils, one of whom was the appellant's son. While this display was in progress the floor of the room collapsed and the appellant suffered severe injuries in respect of which she sued the managers:—

Held, (1.) that the managers were a public authority within the protection of the Public Authorities Protection Act, 1893; (2.) that the authorization of the display on the school premises was an exercise by the managers of their functions as such; (3.) that the neglect or default proved against the managers in respect of the floor was neglect or default in the exercise of their statutory duty; (4.) that the appellant was an invitee and not a mere licensee; but (5.) that the action failed inasmuch as it was not commenced within six months next after the neglect or default complained of.

Decision of the Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal (Sir Wilfrid Greene M.R., MacKinnon and Finlay L.JJ.) affirming a judgment of Tucker J. at Liverpool Assizes in favour of the respondents, who were the managers of a non-provided elementary school in Liverpool, at which the son of Mrs. Griffiths was a pupil.

On the evening of December 12, 1934, Mrs. Griffiths, with others, was invited by the headmaster of the school, with the authority of the managers, to attend an exhibition on the school premises of work done by the boys. During the evening, while the display was going on, the floor of the premises collapsed, and Mrs. Griffiths suffered serious injuries, in respect of which she sued the managers, the writ in the action being dated October 12, 1936, that is twenty-two months after the accident. To that claim the managers pleaded that they were protected from liability by the Public Authorities Protection Act, 1893, and the sole question on the appeal was whether the plea should prevail.

---

* *Present:* VISCOUNT SIMON L.C., VISCOUNT MAUGHAM, LORD WRIGHT, LORD ROMER, and LORD PORTER.

Tucker J. and the Court of Appeal took the view that the action of the school managers in authorizing the invitations to the display on the school premises, after normal school hours, must be regarded as exercising their function of managing the school. As Tucker J. said: "the managers "had a material interest in inviting the [appellant] to the "premises, in the sense that it was in the interests of the "prosperity and success of the school to enlist the support "and co-operation of the parents of the pupils in the work "done at the school. The display in question consisted "entirely of an exhibition of the work done by the pupils and "of the singing of songs which they had learnt at the school. "I accordingly hold that the plaintiff was an invitee, and not "a mere licensee. I am further of opinion that on the "occasion in question the school was being used as a public "elementary school, and not for some extraneous purposes "unconnected with its functions as a school."

The plaintiffs appealed.

Wilfrid Clothier K.C. and *M. Turner-Samuels* for the appellants. The female appellant was present on the school premises on the invitation of the managers. While there she was injured by the collapse of the floor which obviously was in a state of great disrepair, and in view of that the managers should not have invited her to be present, or, at any rate, they should have warned her of the possibility of danger. Moreover, the managers were not, as regarded the appellant, a public authority, and, consequently, not entitled to the benefit of the Public Authorities Protection Act, 1893. The appellant's right to be present was solely by reason of the invitation sent to her, a purely private arrangement. There is a vital distinction between *Greenwood* v. *Atherton* (1) and the present case. In *Greenwood's* case (1), the managers of a non-provided voluntary school, in providing a playground for the children, were held to be a public body acting in pursuance of a statutory duty and were entitled to rely on the Public Authorities Protection Act. We submit that that decision was wrong. The use to which this building was put at the material time was at most permitted and was purely ancillary ; its then use was not enjoined by the Education Acts.

A. T. Miller K.C., *S. Scholefield Allen* and *Basil E. Nield* for the respondents were not called upon.

The House took time for consideration.

1940. Dec. 12. Viscount Simon L.C. My Lords, this is an appeal from the Court of Appeal (Sir Wilfrid Greene M.R., MacKinnon and Finlay L.JJ.) affirming the judgment of Tucker J. at Liverpool Assizes in favour of the respondents.

The first five respondents are the managers of a public elementary school in Liverpool, known as St. Clement's Church of England School, and were the principal defendants in an action brought by the appellants, Mr. and Mrs. Griffiths, for damages in respect of personal injuries sustained by the last-named when upon the school premises, owing to a shocking accident which occurred on the evening of December 12, 1934. Mrs. Griffiths, whose son was a pupil at the school, was one of those invited by the headmaster, with the authority of the managers, to attend an exhibition on the premises of work done by the boys. There were also to be songs during the evening which the pupils had learned while attending the school. While this display was going on, the first floor of the school premises collapsed ; many persons, including Mrs. Griffiths, suffered serious injuries and two persons were killed.

There is no dispute that the floor was in a dangerous condition. The school building was nearly a hundred years old ; the method of support of the floor was quite obsolete ; the

---

(1) [1939] 1 K. B. 388.

H. L. (E.)
1940
GRIFFITHS
v.
SMITH.
Viscount
Simon L.C.

defects in the structure were obvious to inspection; there had been no survey of the building for thirty years prior to the accident. Tucker J. found as a fact that those who were charged with the duty of keeping the premises in repair had not taken reasonable care to discharge that duty. This view of the matter has not, I think, been challenged in any stage of the litigation, and on the undisputed evidence no other view is possible.

The duty of keeping the school house in good repair rests upon the managers (Education Act, 1921, s. 29, sub-s. 2 (*d*)). This duty they are to discharge " out of funds provided by "them "—that is to say, they have no call upon public funds for the purpose. The sources to be drawn upon are, in practice, voluntary subscriptions or donations, and in some cases trust funds or endowments. This provision was originally enacted in the Education Act, 1902, s. 7, sub-s. 1 (*d*), but the Act of 1902 was repealed by the Act of 1921, which reproduced in substance the contents of the earlier Act. The Education Act of 1902 effected a compromise under which "non-provided" schools (which at an earlier stage were commonly known as "voluntary" schools) were maintained and kept efficient by the local education authorities, and thus indirectly received the support of local rates for that purpose, on the condition that the managers of a non-provided school "shall provide the school house free of any charge, except for "the teacher's dwelling-house (if any), to the local education "authority for use as a public elementary school, and shall, "out of funds provided by them, keep the school house in good "repair, and make such alterations and improvements in the "buildings as may be reasonably required by the local "education authority: Provided that such damage as the local "authority consider to be due to fair wear and tear in the use "of any room in the school house for the purpose of a public "elementary school shall be made good by the local education "authority;".

It is the provision and maintenance by the managers of the school fabric in good repair which is the quid pro quo for the advantages conferred on non-provided schools by the scheme of the Act, with the result that the managers have extensive powers in the appointment and dismissing of teachers, and religious instruction may be given in accordance with the provisions of any trust deed relating to the school. It cannot be too clearly understood that the managers of a non-provided school are not entitled to claim that it should be maintained by the local education authority as a public elementary school unless they perform their part of the statutory bargain and keep the school house in good repair. The statute, as I have already observed, says that the managers are to do this "out of funds provided by them," and the explanation of the deplorable condition of these school premises is that sufficient funds were not forthcoming from private sources to do the necessary repairs. In such a case, the managers should exercise their powers to bring the school to an end (see ss. 38 and 40 of the Education Act, 1921); they have no right to attempt to carry on the school when the premises are in a condition which is dangerous to the safety of children and teachers, and it is no excuse for doing so to say that adequate funds were not forthcoming.

The body of managers constituted for a "non-provided" public elementary school is the creation of the statute, and the statutory provision is now to be found in s. 30, sub-s. 2, of the Education Act, 1921. That section provides that not more than four of them shall be "foundation managers," appointed under the provisions of the trust deed of the school, or under an order made in pursuance of the Education Acts. To these are to be added further managers not exceeding two in number —in the case of Liverpool—by the local education authority. To the managers thus appointed of a "non-provided" school is entrusted the management of the school in all matters not expressly reserved to the local education authority. This statutory body of managers, charged with these important functions, is therefore quite distinct from any general managerial body which may have been constituted or contemplated by the trust deed under which the school came into existence; these latter have for practical purposes disappeared, and the new statutory body is the only body with authority to manage the school.

Counsel for the appellants put their claim on the basis that the managers had invited Mrs. Griffiths to come upon premises, which the managers occupied and controlled, without warning her of their dangerous condition and without putting them in a proper state of repair. So stated, the claim is to enforce a common law liability which is generally illustrated by referring to the decision, given more than seventy years ago, by the Court of Exchequer Chamber in the leading case of *Indermaur* v. *Dames* (1). Tucker J. found this claim proved, citing in support of the view that the managers must for this purpose be regarded as occupiers, an unreported decision of Singleton J. in *Tierney* v. *Smith* (2), which dealt with injuries sustained by another plaintiff arising out of the same accident. The Court of Appeal took the same view, and, apart from the defence raised under the Public Authorities Protection Act, 1893, both the courts below would have decided in favour of the present appellants.

I entirely concur and entertain no doubt that if Mr. and Mrs. Griffiths had issued their writ more promptly, they would have had an effective cause of action against the managers (she, on account of the injuries she sustained owing to their breach of duty, and he, because of the resulting loss of his wife's services while she was incapacitated). But the writ was issued on October 12, 1936, twenty-two months after the accident, and the managers thus have the opportunity of pleading that they were protected by the Public Authorities Protection Act, 1893. The sole question in the appeal is whether this plea should prevail.

Sect. 1 of the Public Authorities Protection Act (now in substance reproduced with the substitution of twelve months for six months in the Limitation Act, 1939) begins as follows: "Where after the commencement of this Act any action, "prosecution, or other proceeding is commenced in the United "Kingdom against any person for any act done in pursuance, "or execution, or intended execution of any Act of Parliament,

(1) (1867) L. R. 2 C. P. 311.

(2) (1936) Unreported.

"or of any public duty or authority, or in respect of any alleged "neglect or default in the execution of any such Act, duty, or "authority, the following provisions shall have effect: (*a*) The "action, prosecution, or proceeding shall not lie or be "instituted unless it is commenced within six months next "after the act, neglect, or default complained of, or, in case "of a continuance of injury or damage, within six months "next after the ceasing thereof: . . . ."

No case was made at the trial that the injury, which began on December 12, 1934, continued to within six months of the date of the writ, and accordingly the managers must be regarded as relieved from any legal responsibility if the Act can be prayed in aid in the circumstances of the present case.

The scope of application of the Public Authorities Protection Act has been the subject of many decisions, and the question was considered by your Lordships' House in *Bradford Corporation* v. *Myers* (1), where some of the earlier cases were in effect approved. I have had the advantage of reading the opinion about to be delivered by my noble and learned friend, Lord Maugham, and am glad to adopt his review of these previous decisions.

Lord Haldane's speech in the *Bradford Corporation* case (1), contained a warning that it might be difficult to extract from the words of the Act a comprehensive principle which would serve as a complete guide for the future. "In such a "case," said Lord Haldane, "the Court can only take the "particular facts in the case before it, and decide as best it "can whether they come within the words, or they fall "altogether outside them. The essentially negative method "of the second alternative often renders it, where it applies, the "easiest and safest one to use, and sometimes it admits of a "principle of exclusion being laid down where no principle "can be formulated affirmatively with any confidence in its "legitimacy."

One difficulty in determining the exact scope of the Act has arisen from the circumstance that its first and main section is so widely drawn as to suggest that the protection which it

---

(1) [1916] 1 A. C. 242, 247.

H. L. (E.)
1940
GRIFFITHS
v.
SMITH.
Viscount Simon L.C.

affords is available to " any person " for any act done by him in intended execution of any Act of Parliament, or in pursuance of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority. There is, however, a considerable body of case-law to the effect that the Act (as its short title indicates) does not apply to protect defendants who are not, in some sense, " public authorities," even though they are acting under statutory powers. This view is affirmed by Lord Buckmaster in the *Bradford Corporation* case (1), where he says, " ' any " ' person ' must be limited so as to apply only to public " authorities." On this point, the construction of the Act should be regarded as finally settled.

There is, however, a second question connected with the construction of the Act on which it is difficult to reach precision. Assuming that the " person " is a public authority in the sense required, what kind of action by the public authority is to be regarded as satisfying the conditions of the section that the act must be " done in pursuance, or execution, "or intended execution of any Act of Parliament or of any "public duty or authority," or that the neglect or default must be " in the execution of any such Act, duty, or "authority " ? In one sense, everything that is done by a public authority within the limits of their statutory powers might be regarded as done in execution of the statute. Even if a public corporation exist independently of statute, all their actions within their powers might perhaps be regarded as done in execution of their public authority. But this House has decided in the *Bradford Corporation* case (1), that the statute ought not to be given so wide a construction. " It is not "because the act out of which an action arises is within their "power," said Lord Buckmaster (2), " that a public authority "enjoys the benefit of the statute. It is because the act is "one which is either an act in the direct execution of a statute, "or in the discharge of a public duty, or the exercise of a "public authority." In the *Bradford Corporation* case (1), the corporation had power to carry on a gas undertaking

(1) [1916] 1 A. C. 242.

(2) Ibid. 247.

and were bound to supply gas to the inhabitants of the district. In addition, they had statutory authority (which they were not however bound to exercise) to sell the coke produced in the manufacture of the gas. They did so, and a cart-load of coke, in the course of being delivered to a particular purchaser, was negligently shot through his window. This House held that the Public Authorities Protection Act did not apply, because the act of contracting to sell the coke to the purchaser and of supplying it was purely voluntary. The Master of the Rolls in the present case explains the *Bradford Corporation* decision (1) by saying that " what they were doing in supplying "coke was not something incidental to, or part of, the process "of carrying on the gas undertaking and supplying gas "compulsorily to the inhabitants. It was something that lay "outside that altogether."

There are thus two questions to be decided as to the application of the Public Authorities Protection Act in the present case. First, are the managers a public authority? Secondly, was the neglect or default proved against them neglect or default in the execution of their statutory duty or authority? In my opinion, both these questions should be answered in the affirmative.

As regards the first question, the body of managers are a statutory body created by the Education Acts for the discharge of public duties. They are not analogous to companies acting for profit (as in *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour* (2), nor to voluntary charitable associations (as in *Ayr* v. *St. Andrew's Ambulance Association* (3), but rather to the long list of authorities set up by Parliament for carrying out public responsibilities, which have been held protected by the Act, of which insurance committees under the National Health Insurance Acts—*Mitchell* v. *Aberdeen Insurance Committee* (4), or the Wheat Commission (*Paul, Ld.* v. *Wheat Commission*) (5)—are useful examples. The Court of Appeal has already held in

---

(1) [1916] 1 A. C. 242.
(2) [1900] 1 Ch. 749.
(3) 1918 S. C. 158.
(4) 1918 S. C. 415.
(5) [1937] A. C. 139.

Greenwood v. *Atherton* (1), that the managers of a non-provided school are a public authority within the protection of the Act, and it appears to me that this view is right.

Lastly, was the action of the managers in authorizing the invitations to this school-display an act done in the execution of their statutory duty or authority? It was strenuously contended for the appellants that this action was "voluntary" in the sense in which the sale of coke in the *Bradford Corporation* case (2) was voluntary. It is true that St. Clement's school could have been carried on without arranging to hold this display. But that is not the true test. The real question is whether the managers, in authorizing the issue of invitations to the display on the school premises after school hours, should be regarded as exercising their function of managing the school. To apply the distinction indicated by the Master of the Rolls, was the managers' action "something incidental "to, part of, the process of carrying on" their statutory duty? Both the trial judge and the Court of Appeal took the view that in this matter the managers were doing an act which formed part of the operation of carrying on a public elementary school. As the Master of the Rolls observed, a gathering such as this is a very familiar type of gathering in schools of all sorts. Tucker J. reached his conclusion in a passage which I must quote: "In my view, the managers had a "material interest in inviting the plaintiff to the premises, "in the sense that it was in the interests of the prosperity and "success of the school to enlist the support and co-operation "of the parents of the pupils in the work done at the school. "The display in question consisted entirely of an exhibition "of the work done by the pupils and of the singing of songs "which they had learnt at the school. I accordingly hold "that the plaintiff was an invitee, and not a mere licensee. I "am further of opinion that on the occasion in question the "school was being used as a public elementary school, and "not for some extraneous purposes unconnected with its "functions as a school."

I entirely agree with this view, which has prevailed in both

(1) [1939] 1 K. B. 388. (2) [1916] 1 A. C. 242.

courts below. It would be within the discretion of the managers to decide whether they would approve such a display, or whether they would not. But the point is that they did approve it, and that they did so in the course of carrying on this public elementary school and of exercising the powers of management conferred upon them by the Education Act. There is, in my opinion, no ground whatever for saying that the invitations issued to this display were issued for some extraneous purpose unconnected with the management of the school.

I am of opinion, therefore, that the managers can avail themselves of the protection of the Act. If they are discharged from liability, it is not disputed that the other defendants are also entitled to succeed, and I need not discuss whether in any event they could be held liable.

I move that this appeal be dismissed.

VISCOUNT MAUGHAM. My Lords, the facts in this appeal have been sufficiently stated in the opinion of the Lord Chancellor and I need not repeat them. Counsel for the appellants, in presenting the appeal, which he did with great clearness, was faced with the difficulty that he had to deal with two careful judgments, that of Tucker J. in the trial court and of the Master of the Rolls in the Court of Appeal (with which MacKinnon and Finlay L.JJ. agreed). I agree with those judgments, and, except on two points, I do not think I could usefully take up your Lordships' time in expressing in my own language that which has been admirably stated by the learned judge and the Master of the Rolls.

The first point is perhaps only a matter of form, but it seems to me worth mentioning in order to prevent possible misconception. It is not quite accurate to say or to imply that the managers of the school under the Education Act, 1921, were liable to repair the school so long as the school was being used as a public elementary school without adding words to show that this liability was to repair " out of funds provided "by them " (s. 29, sub-s. 2 (*d*)). This does not mean that they must repair at their own expense, but that the funds coming to them as managers from endowments or voluntary contributions or otherwise must be so applied. If they cannot out of funds so provided keep the school house in such repair that the school can safely and properly be carried on, it would seem clear that they should exercise their powers of closing the school under s. 40 of the Act ; and it will be observed that under sub-s. 2 of that section the local education authority, if they carry on the school, become subject to an obligation to keep the school house in repair. No notice was given in the present case under s. 40. These remarks, however, have no application to the action so far as it is based on the allegation of failure of duty towards the appellant as an invitee, and it is to be noted that in the Court of Appeal and in this House, counsel for the appellant made it clear that it was only on that ground that he was seeking to obtain judgment for his client.

The other point on which I shall venture to make some remarks which may perhaps be useful, is that which arises on the Public Authorities Protection Act, 1893. Sect. 1 of this Act has now been replaced by the Limitation Act, 1939, which extends the period of limitation from six months to one year (s. 21) and makes a special provision for disability (s. 22 (*g*)) ; but in other respects the language of s. 1 of the Act of 1893 is reproduced so that the difficult questions of construction which constantly arose under that Act will continue to arise except so far as they have been settled by authority.

The question on the present appeal is whether the managers of a non-provided school can rely on the Act of 1893 as a defence to an action by the appellant, who was an invitee to the school premises on an occasion when the floor collapsed and thus caused her serious injury. I have nothing to add to what the noble Lord on the Woolsack has already said as regards the occasion itself. It was in fact an exhibition of work done by the pupils and a performance of songs which they had learnt at the school. It was held by Tucker J. that this was a use for the purposes of a public elementary school. The Court of Appeal agreed with this crucial finding of fact, and I do not think any of your Lordships felt any doubt that that finding was justified.

The appellant had to show that the managers were in occupation and control of the premises, and were therefore under a common law duty to the invitee to take reasonable care to prevent injury to the latter from a hidden danger of which as occupiers they should have been aware, or to warn the invitee of the existence of the danger. Thus the claim is simply on the well known principle of *Indermaur* v. *Dames* (1).

My Lords, for the present purpose we must assume that the appellant is rightly asserting that the managers were in occupation of the school premises so that the principle applies; and I will add that for my part as at present advised I think the contention was justified. This point was so decided by Singleton J. in the similar case of *Tierney* v. *Smith* (2), cited with approval by Tucker J. in the present case. The questions therefore for decision on this appeal as regards the claim against the managers may be stated thus: (1.) Were the managers a public authority within the scope or ambit of the Public Authorities Protection Act, 1893? (2.) Was the act of the managers in inviting the appellant to come to the school premises on the occasion in question an act done in pursuance, or execution, or intended execution of any Act of Parliament or of any public duty or authority (Public Authorities Protection Act, 1893, s. 1)?

Since the decision of this House in *Bradford Corporation* v. *Myers* (3) it has been clear that the Act must be limited so as to apply to a definite class of persons and to a definite class of action: see the speech of Lord Buckmaster L.C. (4). In effect the class of persons is that of public authorities. This result follows from a consideration of the introductory words in s. 1, from the short title to the Act, and from an examination of the nature of the one hundred and eight enactments specified in the schedule, which were repealed to the extent mentioned in the schedule and superseded or replaced with modifications by the Act. This House, however, took the view, often before expressed, that the Act was not intended to cover every act which a public authority might have the power to perform. The *Bradford Corporation* case (1) related to a municipal corporation authorized by statute to carry on the undertaking of a gas company, and bound to supply gas to the inhabitants of the district. It was also empowered to sell the coke necessarily produced in the manufacture of the gas. This House held that the corporation was not entitled to rely upon the Act of 1893 as a defence to an action for negligence brought by a purchaser of coke from the corporation. The coke, it should be added, was shot by their agent through the purchaser's shop window; but the action was not commenced within six months after this untoward event. The ground of the decision as given by Lord Buckmaster was that the negligence was not in performance of " the direct execution of a statute, or in the "discharge of public duty, or the exercise of a public "authority"; and he added that he meant a duty owed "to all the public alike or an authority exercised impartially "with regard to all the public." An incidental power to trade with the public was not, he said, within this qualification. With variations of language I think the other noble Lords agreed. Lord Dunedin stated that he was in entire agreement with Lord Buckmaster's speech, and Lord Atkinson, in the later case of *Harnett* v. *Fisher* (2), cited the material passages from the speech with obvious approval.

---

(1) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.

(2) Unreported; decided February 20, 1936.

(3) [1916] 1 A. C. 242.

(4) Ibid. 247.

My Lords, the decision may be more easily understood if it is realized that, if the argument for the corporation had prevailed, it would seem to follow that the Act would apply for the benefit of every public authority if it could be shown that the act done or intended to be done was intra vires the authority. Thus every contract entered into for the purpose of carrying out any such act, however unwise and whatever the neglect or default of the public authority in carrying out the contract, would have the protection of the Act of 1893. Moreover, such a view would have involved the overruling

(1) [1916] 1 A. C. 242.

(2) [1927] A. C. 573.

H. L. (E.)
1940
GRIFFITHS
v.
SMITH.
Viscount
Maugham.

of a number of decisions, including earlier cases of high authority decided before the passing of the Act of 1893 relating to similar conditions contained in other Acts of Parliament. It is therefore not surprising that this House dismissed the appeal in *Bradford Corporation* v. *Myers* (1), though it should be pointed out that the majority declined to accept as a satisfactory and sufficient ground for the decision the argument that the action was one for breach of contract, which in some previous cases had been treated as a sufficient ground for holding that the Act did not apply.

My Lords, both Lord Buckmaster and Lord Haldane pointed out that the Act was so framed that it did not seem possible to draw a clear line between cases which fell within the Act and those which did not, or to lay down any exact principle; and this view has, I think, been accepted in all subsequent decisions. It seems, however, that some of the previous cases were accepted as having been correctly decided—in particular *Fielding* (more correctly Fielden) v. *Morley Corporation* (2); *The Ydun* (3); *Lyles* v. *Southend-on-Sea Corporation* (4); whilst, on the other hand, *Sharpington* v. *Fulham Guardians* (5) met with some criticism. I will say a word as to the first three of these cases. In *Fielding's* case (2) there was no duty on the corporation to make the aqueduct which overflowed, there was only a power to make it; yet the Act was held to apply. The case went to the House of Lords, but only on the question of solicitor and client costs, and it does not seem to have been argued here. It was, however, approved by Lord Buckmaster in *Bradford Corporation* v. *Myers* (6) and I think by the other noble Lords. In the *Ydun* case (3) the Act was held to apply to an action for negligence by a Harbour Authority in inviting a barque to come up the River Ribble to the port and harbour of Preston at a time when there was not sufficient water in the channel leading to the docks. It was held by the Court of Appeal that the corporation was acting or purporting to act in pursuance of its public duty

(1) [1916] 1 A. C. 242.

(2) [1899] 1 Ch. 1; [1900] A. C. 133.

(3) [1899] P. 236.

(4) [1905] 2 K. B. 1.

(5) [1904] 2 Ch. 449.

(6) [1916] 1 A. C. 242, 249.

H. L. (E.)
1940
GRIFFITHS
v.
SMITH.
Viscount Maugham.

as the authority for the port and harbour (which included the River Ribble up to the dock) and that this was sufficient to entitle them to the benefit of the Act of 1893. In the *Southend-on-Sea* case (1) the negligence alleged was in the working by the corporation of an electric tramway under a power conferred by an Order in pursuance of the Light Railways Act, 1896. The passenger had paid his fare, obtained his ticket, and taken his place, and there was therefore an implied contract by the corporation to carry him with reasonable care, but nevertheless the corporation was held by the Court of Appeal to be entitled to the statutory defence because the action was in substance founded on a breach by the defendants of their duty under the Light Railways Order.

My Lords, since the decision of this House in the *Bradford Corporation* case (2) and the tacit or express approval of the cases I have referred to, it has been impossible to doubt (if it was doubtful before) that it is not essential that a public authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge or attempted discharge of a positive duty imposed on the public authority. It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade. The words in the section are "public duty or authority," and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation. The same view is, I think, implicit in the decision of this House in *R. & W. Paul, Ld.* v. *Wheat Commission* (3). There is another decision of this House which may usefully be referred to. It was held in the case of *Graigola Merthyr Co., Ld.* v. *Swansea Corporation* (4), that s. 1 of the Act of 1893 applied to a quia timet action, although the repeated references in the section to an act done and to neglect or default might well point to another conclusion. The judgment in this House was delivered by

(1) [1905] 2 K. B. 1.
(2) [1916] 1 A. C. 242, 249.
(3) [1937] A. C. 139.
(4) [1929] A. C. 344, 349.

Lord Buckmaster, and he declined to treat the matter as one which was free and open for discussion. There were, he said, precedents of very great authority, long standing and uniform, and in such a case, relative to a question of statutory practice, he could not think that it would be right to set those authorities aside.

My Lords, these observations apply to some extent to the present appeal, and I do not think any of your Lordships would be disposed to interfere after a good many years with the established current of decisions on questions as to the applicability of the Act of 1893.

That persons in a somewhat similar position to that of the managers in the present case have been treated as a public authority has been decided in numerous cases. The following are examples: River Commissioners and harbour boards acting without profit (*The Johannesburg* (1), and *Williams* v. *Mersey Docks and Harbour Board* (2)); all kinds of sanitary, water and tramway authorities, and the officers and servants of such authorities, e.g., medical officers of health, or persons in a like position: *Weir* v. *Thomas and Abson* (3); *Freeborn* v. *Leeming* (4); *Venn* v. *Tedesco* (5); *Nelson* v. *Cookson* (6); *Clarke* v. *Bethnal Green Borough Council* (7). Unless quite a number of these cases ought to be overruled, I cannot doubt but that the managers in the present case are within the protection of the Act. It seems to me to be clear that in carrying on the school they were carrying out a public duty.

The second question I have formulated above relates to the character of the act of the managers. When the invitations were issued to a number of persons, including the appellant, were the managers doing an act in execution, or purported execution, of a public duty or authority in relation to the school? For the reasons I have given it is, I think, immaterial that the managers were not bound to invite persons to what was called an "open meeting," to see exhibits of work done by the boys. If that is correct, it seems to me that the express finding of Tucker J. that the school on the occasion in question was being used as a public elementary school, and not for some extraneous purpose is almost conclusive. If, as I think we must assume, the managers thought that the open meeting was in the interests and for the benefit of this voluntary school, the act of inviting people to attend was a thing done in direct discharge of a public duty, namely, that of carrying on the school to the best advantage. I am using the adjective "direct" simply as indicating that the duty was cast upon the managers by the mere fact that they were bound to carry on the school as efficiently as possible. This, I think, is using the word in the same sense as that which was attributed to it in the *Bradford Corporation* case (1) and if so understood I am quite content to follow the lead of Lord Buckmaster in his use of the word.

---

(1) [1907] P. 65.
(2) [1905] 1 K. B. 804.
(3) (1914) 79 J. P. 54.
(4) [1926] 1 K. B. 160.
(5) [1926] 2 K. B. 227.
(6) [1940] 1 K. B. 100.
(7) (1939) 55 Times L. R. 519.

There is strong authority in favour of this view in addition to the cases which this House appears in the *Bradford Corporation* case (1) to have accepted as correct. To give a single additional instance, the well known case of *Edwards* v. *Metropolitan Water Board* (2) seems to me in point, and it was approved by Lord Atkinson in this House in *Harnett* v. *Fisher* (3). In *Edwards's* case (2), the defendants were under a statutory duty to supply water to the inhabitants of a large area and to maintain water-pipes for that purpose. Repairs to the latter were often needed and the defendants sent a steam lorry to convey some cast-iron pipes to a district depot and to return bringing back empty casks and drums to the central depot. On the return journey the driver of the lorry negligently ran over and injured the plaintiff. It was held by Bankes and Scrutton L.JJ. that the Public Authorities Protection Act, 1893, applied. It should be mentioned that Younger L.J., as he then was, differed, but he said that if the accident had taken place on the outward journey of the lorry he would have held that the Act of 1893 applied. For the present purpose it is sufficient to point out that the lorry (though there was no positive obligation to send it) was sent out in exercise of a power or of an authority conferred on the defendants and that the power or authority was being exercised directly for the public benefit. In my opinion this decision was correct.

---

(1) [1916] 1 A. C. 242.
(2) [1922] 1 K. B. 291.
(3) [1927] A. C. 573, 592.

My Lords, like the noble Lords who took part in the decision in the *Bradford Corporation* case (1), I must admit the impossibility of drawing a clear line of distinction between the cases; but following views expressed by Tucker J. and by the Court of Appeal, I have no difficulty in coming to the conclusion, after an examination of, I think, all or nearly all the authorities including those above referred to, that in this case the managers are entitled to the protection of the Public Authorities Protection Act, 1893.

For these reasons, which are but supplementary to those given by the Lord Chancellor, I am of opinion that this appeal should be dismissed.

My Lords, my noble and learned friend Lord Romer, who is unable to be here this afternoon, has asked me to say that he concurs in this motion.

LORD WRIGHT. My Lords, the appellants have failed in the courts below on the ground that the Public Authorities Protection Act, 1893, applies to their claims and they have not been brought within the period of six months fixed by the statute then in force. Even the extended period of limitation which the Limitation Act, 1939, s. 21, fixed at twelve months would not have helped them, because they did not bring their action until twenty-two months after the injury sustained by the female appellant. It is impossible not to sympathize with persons who having suffered a grave wrong find their claims defeated in this way. But a definite period of limitation may often involve a serious prejudice in particular cases. All that can be said is that the legislature has fixed the precise period, no doubt for what have seemed to it good reasons.

Margaret Elizabeth Griffiths, the female appellant and principal plaintiff, was very severely injured on the evening

(1) [1916] 1 A. C. 242.

H. L. (E.)
1940
GRIFFITHS
v.
SMITH.
Lord Wright.

of December 12, 1934, when she was attending a display of pupils' work at St. Clement's School, in Liverpool, where her son was a pupil. She, along with other parents, had been invited to attend by the headmaster, who issued the invitation with the authority of the first five respondents. They were the school managers and are herein referred to as the managers. The display consisted entirely in an exhibition of work done by the pupils and in the singing by the pupils of songs which they had learned at the school. It took place on the first floor of the school building. This suddenly collapsed owing to the scandalously bad state of repair of the building. The floor was in a seriously dangerous condition. The building was about one hundred years old and had not been surveyed for thirty years. Many of the parents suffered serious injuries. This action was in the nature of a test action.

On these facts both Tucker J. and the Court of Appeal rightly held that the appellant was not merely a guest or licensee but an "invitee" to whom was owed the duty, defined in *Indermaur* v. *Dames* (1), and in *Fairman's* case (2). That duty was clearly broken. Indeed, that it was broken was not contested before your Lordships. But the respondents relied on the Public Authorities Protection Act, 1893, which both courts below have held to be a good defence, on the ground that the school was being used at the time as a public elementary school. In the words of the Master of the Rolls, "The managers in the course of carrying on the public "elementary school and exercising the powers of management "conferred on them by the Education Act, 1921, and not "for some extraneous purpose, issue an invitation to the "female plaintiff and others to come to a building which they "are maintaining in pursuance of their obligation under "and for the purposes of the Act." Accordingly, the courts below held, the Public Authorities Protection Act, 1893, applied and was a good defence.

I agree with this conclusion, but various points have been raised on behalf of the appellants, which I must briefly consider.

---

(1) L. R. 2 C. P. 311. (2) [1923] A. C. 74, 80.

H. L. (E.)
1940
GRIFFITHS
v.
SMITH.
Lord Wright.

There was a first question whether the action was rightly brought against the managers at all, because it was urged that the second set of defendants were the only proper defendants. These were certain members of the General Committee of the Church of England Schools Society. The third set of defendants were the trustees of the property of the society. As to them I need say no more than that they were admittedly bare trustees and no relief was claimed against them.

That the first set of respondents were properly sued is to my mind clear, regard being had to the provisions of the Education Act, 1902, now embodied in the Education Act, 1921, which was a Consolidating Act. For convenience I shall refer to the relevant sections of that latter Act which replaced the corresponding sections of the Act of 1902. That Act gave a special status and special rights to the voluntary schools, which were thenceforth called non-provided schools. The school in question belonged to that class. Such schools were called non-provided schools because the local authority did not provide the school buildings or repair them, but the managers bore that responsibility in return for the right of giving such denominational religious instruction as they desired. Sect. 29 (*d*) of the Act of 1921 enacted that the managers of the school should provide the schoolhouse free of charge, except for the teachers' dwelling-house (if any), to the local education authority for use as a public elementary school and should out of funds provided by them keep the schoolhouse in good repair, subject to fair wear and tear in specified respects. On the other hand, s. 29, sub-s. 2, imposed on the local education authority the obligation to maintain and keep efficient under the Act a public elementary school not provided by them so long as the school was necessary, subject to various conditions set out. The Act gave certain powers and control over the non-provided school to the local authority, which was responsible for all secular education in it. Sect. 30, sub-s. 2, provided for the constitution of a body of managers in non-provided public elementary schools which was to consist of not more than four foundation managers, and not more than two managers appointed by the appropriate local authority. Sect. 35, sub-s. 2, provided that the managers of an elementary school should have power to fulfil the conditions required to be fulfilled to earn the Parliamentary grant and to fulfil any other conditions, perform any duties and exercise any powers under the Act, notwithstanding any provision contained in any trust deed of the school. Sect. 35, sub-s. 3, provided that the body of managers appointed under the Act for a non-provided school should be the managers of the school both for the purposes of the Act and so far as respected the management of the school as a public elementary school for the purposes of the trust deed. In s. 170, sub-s. 10, the expression " managers " in relation to a public elementary school is defined as including all persons who have the management of the school whether the legal interest in the schoolhouse is or is not vested in them. Sect. 32 provided that the appointment of foundation managers was to be under the trust deed or under an order made under the section, which corresponded to s. 11 of the Act of 1902. It was under this latter section that an order was made by the Board of Education on December 10, 1903. It provided that the nominating body of the foundation managers should be (so far as material) the General Committee of the Liverpool Church of England Schools Society. The five managers who were made defendants to the writ were duly appointed in accordance with the provisions of the order.

In my opinion under these provisions there was established a new statutory body of managers, who, in place of the Committee of the Schools Society were to exercise all the powers of management as specified in s. 35, sub-s. 3. In this I agree substantially with the opinion of Lord Mersey, in *Gillow* v. *Durham County Council* (1). It follows, I think, that there was no justification for joining the two members of the general committee of the society whose functions so far as relevant to this case had passed to the managers. It is not suggested that they had anything to do with the issue of the invitation or the holding of the display. They had no responsibility for the management or repair. Whatever powers in this regard they had exercised under the trust deed before 1902 were transferred to the new body of statutory managers who have superseded them. The courts below rightly dismissed these two respondents from the action.

---

(1) [1913] A. C. 54, 73, 75.

The provisions of the Education Act which I have quoted show clearly in my judgment that the statutory body of managers were within the protection of the Public Authorities Protection Act, 1893, and make it unnecessary to consider the various subtleties and distinctions of interpretation which have at times been raised in regard to the Public Authorities Protection Act. The managers were a statutory organ of a Government Department, now the Board of Education. They were charged by statute with the public duty of managing a public elementary school, and of repairing the school buildings. The claim against them was for a wrongful act committed against the appellants in the course of the statutory duty of managing the school. This case is widely different from such a case as that discussed in *Ayr* v. *St. Andrew's Ambulance Association* (1), where it was held that the Public Authorities Protection Act did not apply to a voluntary charitable institution though incorporated by Royal Charter. The words of the statute are satisfied as soon as it is rightly found, as it has been, as already stated, that on the occasion in question the school was being used as a public elementary school. There was thus in the words of the Public Authorities Protection Act a "neglect or default "in the execution of any such Act, duty or authority."

Mr. Clothier has, however, contended that this is not the true conclusion, on the ground that this was not a default in the execution of a public duty or authority, but simply a breach of a private duty, owed to a private person, the female appellant, arising out of a private transaction, namely, the invitation to attend the display. But this argument would apply, if sound, to almost all, if not all cases, in which the Public Authorities Protection Act is in practice invoked. The plaintiff in such cases is a private litigant, complaining of a

(1) 1918 S. C. 158.

H. L. (E.)
1940
GRIFFITHS
v.
SMITH.
Lord Wright.

wrong done to him in his private capacity. But though the wrong is in this sense private, the question is whether it was committed by the defendant in the execution or intended execution of a public duty or authority. As a single illustration of this I may refer to *The Ydun* (1), where the Dock Authority successfully relied on the Act against a claim by a shipowner for damages because the authority had been negligent in inviting the ship to come up the river when there was not sufficient water so that the ship sustained damage. It was enough that the authority was acting in the execution of a public duty. On this reasoning this contention of Mr. Clothier fails.

It has also been urged that the issue of the invitation was not an act done in the execution of a statutory duty, because there was nothing in the Education Act which specifically required that to be done ; the issue of the invitation was, it was said, purely voluntary. The Master of the Rolls, in my opinion, sufficiently deals with this argument when he points out that an Act of Parliament does not deal with details of the manner in which its provisions may be carried out. " Schools," he said, " can be carried on in one way or another. There is a "multitude of details which can be done in this way or in that "way, or perhaps omitted altogether, without the school "ceasing to be a public elementary school." It is enough in this case that it has been found that in holding the display the school was being used as a public elementary school. "Management " is a word of wide import. Thus in *Gillow* v. *Durham County Council* (2), it was held to include the appointment of a school caretaker and cleaner. In *Greenwood* v. *Atherton* (3), it was held to include providing and controlling the school playground, so that the claim of a boy injured through defects in the playground was barred because not brought within the six months. No support is afforded to the appellants by the decision in *Bradford Corporation* v. *Myers* (4). That decision did indeed show that the thing done is not necessarily done in execution of a public duty or authority by a statutory corporation merely because it is intra vires. The Bradford Municipal Corporation in virtue of various Acts of Parliament as held by Lord Buckmaster L.C., were authorized to carry on the undertaking of a gas company. They were in terms bound to supply gas to the inhabitants of the district, and they also had power to sell coke. It was held by this House that in selling the coke or perhaps more accurately in the process of delivering the coke under a contract of sale they were not acting in execution of a public duty or authority. Some expressions used in that case were cited as favouring the appellants' arguments in this appeal. *The Ydun* (1), was cited by the Lord Chancellor as a sound decision, so that he did not exclude a case from the Public Authorities Protection Act merely because a private person suffered a private wrong. He held that the statute applied if the act was in " direct " execution of a statute, or in the discharge of a public duty or the exercise of a public authority. What " direct " means is however often difficult to ascertain. Lord Haldane (2), who also uses the test of " direct," goes on to say, " What causes of action fall within these categories "it may be very difficult to say abstractly or exhaustively. "It is hardly easier to define a priori the meaning of being "done directly than it is to define the number of grains that "will make a heap." However, in the present case the managers in issuing the invitation were in my opinion "directly " engaged in the management of the school. I do not think that the difficulty discussed in *Myers'* case (3) really arises. Much turned, I think, in that case on the sharp antithesis of two operations, the one to supply gas, which was obligatory on the corporation, and the other to sell coke, which was optional. This made it easier to dissever the two operations, though in one sense both might be regarded as falling within the general idea of a gas company's undertaking which necessarily involved not merely the making and supply of gas but the disposal of coke and other residual products. For the purposes of the present case, however, there is no reason to distinguish as optional or obligatory different items which may go to make up management of the school. What was being done was, in my opinion, clearly done as an item in the management of the school which was a public duty obligatory on the managers so long as they continued it. It is true that under the Education Act, s. 40, managers of a non-provided school may under certain conditions as to notice decide to close their school and in that way relieve themselves of their duties as managers. But that does not affect their position before they retire from their duties, or enable it to be said that their functions were voluntary or optional.

---

(1) [1899] P. 236.
(2) [1913] A. C. 54.
(3) [1939] 1 K. B. 388.
(4) [1916] 1 A. C. 242.

---

(1) [1899] P. 236.

(2) Ibid. 251.

(3) [1916] 1 A. C. 242.

It is not here necessary to consider what the position would have been if the accident had occurred when the school was being let to outsiders for use as a bazaar or a political or other meeting or for other than school purposes.

On the whole case I agree with the decisions of the courts below and think that the appeal fails and should be dismissed.

LORD PORTER. My Lords, the appellants in the appeal sued the respondents for damage said to be caused by the negligence of the respondents or some of them towards Mrs. Griffiths. Her husband, John Griffiths, claims for loss of her services, and she claims in respect of her own injuries.

The first five respondents are the managers of a non-provided elementary school in Liverpool known as St. Clement's Church of England Schools, the sixth and seventh respondents are two of the members of the General Committee of the Church of England Schools Society: they were sued as representing themselves and all other members of the General Committee of that society, but as no representation order was obtained, it is admitted that they could only be liable, if liable at all, as individuals. The remaining respondents are trustees of the society; no relief is sought against them personally but they are joined as trustees of the society because it is suggested that recourse to the property of the society by way of execution could only be obtained by making them parties.

St. Clement's School was originally a voluntary school and was a non-provided school within the meaning of the Education Acts, 1902 and 1921.

The accident of which complaint is made occurred on December 12, 1934. On that day Mrs. Griffiths attended the school, of which her son was a pupil. She had been invited to be present at an open evening between 7 and 8.30, when there was to be a display of scholars' handiwork and the singing of songs by the scholars. The invitation was signed by the headmaster and was issued with the approval and authority of the managers of the school.

The display took place on the first floor of the building, and whilst it was in progress the floor gave way, with the result that two persons were killed and many others, including Mrs. Griffiths, were injured. The learned judge who tried the case found that the managers were negligent in failing to keep the building in proper repair, and this finding was not controverted either in the Court of Appeal or before your Lordships' House. He also found that Mrs. Griffiths was an invitee and this too was not disputed.

Admitting that there had been negligence in repairing the school building, the question arose who, if anyone, was responsible to Mrs. Griffiths for her injuries and whether those liable were protected by the Public Authorities Protection Act, 1893. The history of the school may be briefly stated.

In 1837 funds were raised and land purchased and conveyed to trustees under a trust deed of September, 1837, upon trust to permit and suffer the schools and buildings to be erected thereon to be appropriated and used for the education of the children of the poor in such manner and subject to such rules and regulations in all respects as the general committee for the time being of the Church of England Schools Society should from time to time direct and so that such buildings, schools and premises should at all times be considered to be and actually be in the possession and under the control of the committee for the time being and upon trust to permit and suffer the schools and buildings to be from time to time repaired at the discretion of the committee at the expense of the society.

The land upon which St. Clement's School was subsequently built was not conveyed by this deed but by deeds of May and September, 1841, though the trusts were the same as those expressed by the earlier deed and the rules of that deed applied and were from time to time amended and added to as provided by the deed.

At some time before 1875 the school appears to have passed into the control of the incumbent of St. Clement's Church and of those in authority in that church. The phrase used was that it had been "adopted by the congregation." It seems that by 1867 the society adopted the system of making grants to the poorer schools of the city and has ever since been in practice a Schools Aid Society.

To such an extent had the society left the management to the church officials that by 1877 the incumbent was claiming to be owner and refusing to recognize the society or general committee. In that year, however, the society successfully established its ownership but appears to have acceded to the request of the incumbent and to have left the management in the hands of the congregation.

Indeed from 1878 to 1902 the committee appointed no manager or teacher and did nothing save make a grant of 50*l.* towards the expenses of the school and on two occasions extra grants towards extraordinary repairs. Upon these facts Tucker J. found the evidence insufficient to establish any occupation of the building by the general committee or its agents in 1902.

No doubt the activity displayed by the society in 1875 was the result of the changes effected by the passing of the Education Act of 1870, but actually in a consideration of the present case that Act is only material because it preserved the position of managers of non-provided schools.

A substantial change in their position, however, took place as a result of the Education Act of 1902. I do not think it necessary to consider the provisions of that Act in detail, inasmuch as the position of non-provided schools is now dealt with by the Act of 1921. It is enough to state that the earlier Act substituted certain statutory managers for the managers under the trust deed of non-provided schools and by s. 11, sub-s. 6, made the new body managers both for the purposes of the Elementary Education Acts including the Act of 1902 and so far as respects the management of the school as a public elementary school for the purpose of the trust deed.

The material provisions of the Act of 1921 are contained in the following sections :—

Sect. 17 : "The local education authority for elementary "education, shall, in accordance with and subject to the "provisions of this Act, maintain and keep efficient all public "elementary schools within their area which are necessary, "and have the control of all expenditure required for that "purpose other than expenditure for which under this Part "of this Act provision is to be made by the managers."

Sect. 27 : "Every elementary school which is conducted in "accordance with the following regulations shall be a public "elementary school within the meaning of this Act ; and "every public elementary school shall be conducted in "accordance with the following regulations."

The section then sets out the regulations which were admittedly complied with in the case of St. Clement's school.

Sect. 29, sub-s. 2 : "A local education authority shall "maintain and keep efficient under this Act a public elementary "school not provided by them only so long as the school is "necessary and the following conditions and provisions are "complied with . . . . (*d*) The managers of the school shall "provide the schoolhouse free of any charge, except for the "teacher's dwelling house (if any), to the local education "authority for use as a public elementary school, and shall, "out of funds provided by them, keep the schoolhouse in "good repair, and make such alterations and improvements "in the buildings as may be reasonably required by the local "education authority." Sub-s. 6 : "The managers of a school "maintained but not provided by the local education "authority shall have all the powers of management required "for the purpose of carrying out this Act and shall, subject "to the powers of the local education authority under this "section, have the exclusive power of appointing and dismissing "teachers." Sub-s. 7: "One of the conditions required "to be fulfilled by an elementary school not provided by a "local education authority in order to obtain a parliamentary "grant shall be that it is maintained under and complies with "the provisions of this section."

Sect. 30, sub-s. 2: "All public elementary schools not "provided by the local education authority shall have a body "of managers consisting of a number of foundation managers "not exceeding four appointed as provided by this Act, "together with a number of managers not exceeding two "appointed . . . . (*b*) where the local education authority "are the authority of a borough . . . . both by that "authority."

Sect. 31, sub-s. 1: "The foundation managers of a school "shall be managers appointed under the provisions of the "trust deed of the school or under an order made in pursuance "of this Act or s. 11 of the Education Act, 1902, or under the "trust deed of the school as modified by any such order.

Sect. 32, sub-s. 1: "If it is shown to the satisfaction of the "Board of Education that the provisions of the trust deed "of a school not provided by the local education authority "as to the appointment of managers are in any respect inconsistent with the provisions of this Act, or insufficient "or inapplicable for the purpose, or that there is no such "trust deed available, the Board of Education shall, on the "application of the local education authority or any other "person interested in the management of the school, make "an order under this section for the purpose of meeting the "case." Sub-s. 6: "Any order made under this section, where "it modifies the trust deed of a school, shall have effect as "part of the trust deed . . . ."

Sect. 35, sub-s. 2: "The managers of an elementary school "shall have power to fulfil the conditions required to be fulfilled in order to obtain a parliamentary grant, and to fulfil "any other conditions, perform any duties, and exercise any "powers under this Act notwithstanding any provision "contained in any trust deed of the school." Sub-s. 3: "The "body of managers appointed under this Act for a public "elementary school not provided by the local education "authority shall be the managers of the school both for the "purpose of this Act and, so far as respects the management "of the school as a public elementary school, for the purposes "of the trust deed."

Sect. 40, sub-s. 1: "The managers of a public elementary "school not provided by the local education authority, if "they wish to close the school, shall give 18 months' notice "to the local education authority of their intention to close "the school, and a notice under this provision shall not be "withdrawn except with the consent of the local education "authority." Sub-s. 2: "If the managers of a school who have "given such notice are unable or unwilling to carry on the "school up to the expiration of the period specified in the "notice, the schoolhouse shall be put at the disposal of the "local education authority, if the authority so desire, for the "whole or any part of the period, free of charge, for the "purposes of a school provided by them, but subject to an "obligation on the part of the authority to keep the school-"house in repair and to pay any outgoings in respect thereof, "and to allow the use of the schoolhouse and the school "furniture by the persons who were the managers of the "school to the like extent and subject to the like conditions "as if the school had continued to be carried on by those "managers."

Sect. 170, sub-s. 10: "The expression 'managers' in "relation to an elementary school includes all persons who "have the management of the school, whether the legal "interest in the schoolhouse is or is not vested in them."

So far as the action was levelled against the managers it was admitted by those respondents that they were in control of the school at the material time and that Mrs. Griffiths had been present at the display by their invitation. For them the only defence relied upon was the protection said to be afforded by the Public Authorities Protection Act, 1893. The appellants however claimed that the General Committee of the Church of England Schools Society were also liable because, as was asserted, the committee were in control and occupation of

St. Clement's School not only up to 1902 but up to the date of the accident.

If the learned judge's finding of fact has evidence to support it (and I think the evidence ample) his finding is conclusive as regards the period ending in 1902; but the material question is as to the position after that date and, indeed, as to the position after the passing of the Act of 1921.

It is for this reason that I have set out the various sections of that Act.

Both courts which have adjudicated upon the matter have held that whatever may have been the case before those dates the result of the Acts of 1902 and 1921 has been to supplant the managers under the trust deed and to put in their place the statutory managers appointed under the Act "so "far as respects the management of the school as a public "elementary school, for the purposes of the trust deed": s. 35, sub-s. 3.

I am not sure that the appellants controverted this decision, but they maintained that the statutory managers were substituted for those appointed under the trust deed not for all purposes, but only for the purposes of the Act and that during the display the school was not being used for the purposes of the Act, but for the purpose of the trust deed only.

That the statutory managers are in sole control at any time at which the school is being used as a public elementary school appears clear from the sections quoted above; indeed, no interference by any other body during that time could be justified. Under s. 29, sub-s. 6, they have all the powers of management required for carrying out the Act, i.e., for carrying on the school as an elementary non-provided school. Under s. 29, sub-s. 2, they have the obligation to repair and under s. 35, sub-s. 3, they are the managers as respects the management of the building as a public elementary school. For this purpose no distinction is drawn between the foundation managers and the appointed managers. Both alike must manage the school whilst used as a public elementary school—indeed, the provisions of the trust deed as to the appointment of managers and those inconsistent with the conditions prescribed for the receipt of grants out of moneys provided by Parliament may be altered under s. 32, sub-s. 2, and s. 121 of the Act. Moreover, in the present instance, the foundation managers are appointed not under the trust deed but under an order of the Board of Education made under s. 11 of the Act of 1902.

Though no serious controversy arose as to the position and authority of the managers appointed under the Act it was strenuously contended before your Lordships that the display was no part of the school curriculum and took place out of school hours. Apart from arguments to be derived from the nature of the performance it was pointed out that the local education authority had refused to pay for the lighting and heating of the school for the display.

Both courts below have decided that the display formed part of the use of the schoolhouse for the purposes of a public elementary school. I think all your Lordships are agreed that such a use cannot be confined to a time when instruction is being given: the due carrying on of an educational establishment entails the holding of prize-giving ceremonies, of concerts and of exhibitions of the pupils' work and skill. To such entertainments parents are rightfully invited. As the Master of the Rolls has said in his judgment: "There is "a multitude of details which can be done in this way or in "that way, or perhaps omitted altogether, without the school "ceasing to be a public elementary school. A gathering such "as this—and it is a very familiar type of gathering in schools "of all sorts—is one which obviously, I should have thought "—and this view is supported by the finding of the judge— "one in the doing of which the managers were performing "part of their functions as managers in the conduct of this "public elementary school."

It was suggested by the appellants that no change in the position of managers or at any rate of the foundation managers had been effected by the provisions of the Acts of 1902 or 1921 and the expressions used by Lord Haldane in *Gillow* v. *Durham*

County Council (1), where he speaks of the "managers who "were in existence when the Act began to operate" and of their powers "*continuing* to include that of general manage-"ment" and the words of Lord Atkinson in the same case were called in aid. I cannot think that these incidental expressions are to be read as determining that the managers appointed under the Act are the successors of managers under the trust deed to the extent that they are to be regarded as agents for the body which controls the school premises under the terms of the deed. All that Lord Haldane means is, I think, that they exercise the same functions, but not that they bear the same relationship to the owners or controllers of the building. They are a separate and independent statutory body who manage and control the premises whilst in use as a public elementary school.

I do not think that either of these two noble and learned lords intended to differ from Lord Mersey when he says (2): "the effect of the legislation appears to me to be to make the "new statutory body of managers the successors of the "trustees under the old school deed and to vest in them many "of the rights and powers which those trustees previously "had."

It is true that in *Blencowe* v. *Northants County Council* (3) Warrington J. held that the managers of a non-provided school had not such a possession of the premises as to entitle them to bring an action for trespass. He says (4): "The "effect of those provisions of the Act of 1902 seems to me to "be that the Act assumes the provision of the school and says "nothing about the ownership; and I think the true conclusion "to be drawn from the provisions is that the managers have "merely certain statutory rights over such a schoolhouse as "is provided by the owner, whether under a trust deed or, as "in the present case, a private owner." Whether this expression of opinion be accurate or not, it has, I think, little bearing on the present case. The managers have under the Act the right and, if they exercise that right, the duty

(1) [1913] A. C. 54, 65.
(2) Ibid. 73.
(3) [1907] 1 Ch. 504.
(4) Ibid. 527.

of providing the schoolhouse for use as a Public Elementary School under s. 29, sub-s. 2 (*d*), and of repairing it. The invitation was issued under their authority and the use of the building was under their control. At the time when the floor gave way the owners were not in occupation nor could they have issued invitations or interfered with the holding of the display.

Nor can any such distinction, as was attempted, be drawn between the foundation and non-foundation managers at any rate whilst they are acting in the management of the school as a public elementary school. All alike are responsible and in fact in the present case no such distinction has been made —all alike have been sued.

The result of these considerations is that the managers appointed under the Act are a new and independent body who are in control and occupation of the school during such period as it is in use as a public elementary school and that the General Committee of the Church of England School Society were neither in occupation nor control at the time of the accident. This view is supported by the fact that according to the evidence the managers' authority was given for the sending of the invitations. Having regard to this finding it is unnecessary to consider what the position of the statutory managers is when the school is being used privately, e.g., as a Sunday school or for a bazaar ; a problem, in view of the wording of the Act, of some difficulty.

It being established that the managers invited Mrs. Griffiths to the display and were the only persons in occupation and control of the school building when it was held, it has to be determined whether they are liable to her for her injuries.

It is true that under s. 29, sub-s. 2 (*d*), they are under an obligation to repair, and it was suggested by the appellants that for breach of that statutory duty they were liable in damages. But in the first place the duty of repair was not owed to Mrs. Griffiths and in the second place if that duty is statutory and the managers a public authority they would be protected against such a liability by the Public Authorities

Protection Act, 1893, inasmuch as the action was not commenced within six months of the accident.

Alternatively, however, it was said that Mrs. Griffiths was an invitee, that the managers either were not a public authority or, if they were, nevertheless their action in providing the building and managing the school was a voluntary one, which they might perform in the way in which they did, or in some other way or not at all and that it was only in respect of compulsory duties that the Act applied to protect the public body. A number of authorities said to support this view were cited to your Lordships, and particular reliance was placed upon the decision of your Lordships' House in *Bradford Corporation* v. *Myers* (1).

The short heading and terms of the Act are as follows: "Public Authorities Protection Act, 1893": "(1.) Where "after the commencement of this Act any action . . . . is "commenced in the United Kingdom against any person "for any act done in pursuance or execution or intended "execution of any Act of Parliament or of any public duty or "authority, or in respect of any alleged neglect or default "in the execution of any such Act, the following provisions "shall have effect. (*a*) The action shall not lie . . . . unless "it is commenced within six months next after the act neglect "or default complained of."

The wording of the section is in very general terms, but certain limitations have been placed upon the width of its interpretation by decisions, one at least of which is binding upon your Lordships' House.

In the first place, though the word "person" is used, not every person is protected. It is a "Public Authorities "Protection Act" and not a "persons protection act" and therefore the body to be protected must be a public authority: see *Myers* v. *Bradford Corporation* (1), and *The Johannesburg* (2).

What then is a public authority? As Sir Gorell Barnes says in the latter case, the phrase is not confined to municipal corporations. There are many other bodies which perform

(1) [1916] 1 A. C. 242.

(2) [1907] P. 65, 72.

statutory duties and exercise public functions and examples of such bodies are given by the learned President (1).

The distinction which he draws is between a body carrying out transactions for private profit and those working for the benefit of the public. Profit they may undoubtedly make for the public benefit: see *The Ydun* (2), and *Lyles* v. *Southend-on-Sea Corporation* (3), but they must not be a trading corporation making profits for their corporators: see *Attorney-General* v. *Margate Pier and Harbour Proprietors* (4).

That the managers of a public elementary school, however, whether provided or non-provided, are a public authority I cannot doubt. They form part of the machinery whereby elementary education is provided for in this country, and a school which the managers provide is maintained and kept efficient by means of public rates even though the building is provided and repaired by the managers themselves. In carrying on the school they are undoubtedly exercising a public function—perhaps it is sufficient in this connection to quote the words from s. 29, sub-s. 6: " The managers of a "school maintained but not provided by the local education "authority shall have all the powers of management required "for the purpose of carrying out this Act . . . ."

So far as the Court of Appeal is concerned this matter has already been determined in *Greenwood* v. *Atherton* (5), with the reasoning in which in substance I agree, though I doubt whether the fact that the public authority is acting in pursuance of a private Act takes its action out of the category of a public duty.

Not only, however, must the " person " be a public authority but the act done must be done in the execution or intended execution of an Act of Parliament or of any public duty or authority and the neglect must be a neglect or default in the execution of an Act of Parliament or a public duty or authority. It would, I think, be enough to say in the present case that the managers neglected a duty imposed upon them by Act of Parliament, i.e., the duty of repairing the schoolhouse, but I think that the same result follows whether one regards them as neglectful of an Act of Parliament or of a public duty or authority.

---

(1) [1907] P. 79.
(2) [1899] P. 236.
(3) [1905] 2 K. B. 1.
(4) [1900] 1 Ch. 749.
(5) [1939] 1 K. B. 388.

It was argued on behalf of the appellants that the duty neglected was not a public duty because the managers need not have provided the school at all or might have withdrawn it at any time under s. 40, sub-s. 2, of the Act of 1921, and that therefore their act in providing the school was voluntary and not in pursuance of any public duty. I do not think this argument sound, and it is contrary to a long series of authorities. It does not matter that the public duty is one which the defendants need not undertake: it is enough if they have adopted a course of action which imposes upon them the performance of a public duty at the material time, and if the matter of which complaint is made is a default in carrying it out: *Fielding* v. *Morley Corporation* (1); *Jeremiah Ambler and Sons* v. *Bradford Corporation* (2); *Lyles* v. *Southend-on-Sea Corporation* (3), are examples of this principle.

But, say the appellants, even if this be true, the managers were under no duty to carry out their work in the way they chose—there was no need to hold a display or invite parents to attend it. Again, I think this immaterial. As Scrutton L.J. said in *Edwards* v. *Metropolitan Water Board* (4): "Nor does "it matter that the duty could have been carried out in "another way," a proposition in support of which he cited *Edwards* v. *St. Mary Islington Vestry* (5). If the argument were sound the Public Authorities Protection Act would be of little use, since, I imagine, in most cases there are at least two ways of performing a duty and it might be said that the alternative to that actually chosen could have been adopted.

It was further maintained, however, that the act of inviting Mrs. Griffiths to visit the premises was permitted, but not enjoined, by the Act and that in such a case the authorities were not executing a public duty, but engaged in a private act.

(1) [1899] 1 Ch. 1; [1900] A. C. 133.

(2) [1902] 2 Ch. 585.

(3) [1905] 2 K. B. 1.

(4) [1922] 1 K. B. 291, 306.

(5) (1889) 22 Q. B. D. 338

In support of this argument such cases as *Bradford Corporation* v. *Myers* (1) and *Hawkes* v. *Torquay Corporation* (2) were called in aid.

Both were cases of contract and I think it is true to say that a private contract even if entered into in pursuance of an Act of Parliament is not thereby protected but an act which is done in performance of a public duty is still done in the execution of a public duty though it is performed through the medium of a contract. The cases last quoted are examples of the former principle. *Edwards* v. *Metropolitan Water Board* (3) and *Clarke* v. *Bethnal Green Borough Council* (4) of the latter.

Where the act done is permitted but not enjoined the question whether the authority is executing a public duty or merely entering into a private contract is a question dependent upon the true deduction to be drawn from the facts rather than one of pure legal principle. How narrow the line may be is exemplified by the suggestion of Phillimore L.J. in *Clarke* v. *St. Helens Borough Council* (5), that whereas an authority was not protected if its engineer in the course of his duty was being driven by a negligent chauffeur, yet it might have been protected had the engineer been driving himself and had himself driven negligently; and is also exemplified by the opinion of Bankes L.J. in *Edwards* v. *Metropolitan Water Board* (3). In his view if the coke which in *Bradford Corporation* v. *Myers* (1) was being delivered in pursuance of a contract had not been sold but had been carted away in order that the authority might get rid of it and so make room to enable it to meet its statutory obligation of providing gas, the authority would have been protected. In the latter case the carting would have been necessary (directly necessary if that phrase be preferred) in order that its members might comply with their public duty: as it was, they were held merely to be fulfilling a private contract.

The true position is, I think, put by Lord Shaw in *Bradford*

(1) [1916] 1 A. C. 242.
(2) [1938] 4 All E. R. 16.
(3) [1922] 1 K. B. 291, 299.
(4) (1939) 55 Times L. R. 519.
(5) (1915) 85 L. J. (K. B.) 17.

Corporation v. *Myers* (1) when he says "If there be a duty "arising from statute or the exercise of a public function, "there is a correlative right similarly arising. A municipal "tramway car depends for its existence and conduct on, say, "a private and many public acts and the corporation in running "it, is performing a public duty.

"When a citizen boards such a car, in one sense he makes, "by paying a fare, a contract; but the boarding of the car, "the payment of the fare, and the charging of the corporation "with the responsibility for safe carriage are all matters of "right on the part of the passenger, a public right of carriage "which he shares with all his fellow citizens, correlative to "the public duty which the corporation owes to all . . . . "But where the right of the individual cannot be correlated "with a statutory or public duty to the individual, the "foundation of the relations of parties does not lie in anything "but a private bargain which it was open for either the "municipality or the individual citizen, consumer, or customer "to enter into or to decline."

In that case the sale of coke was held to have been effected by a private bargain with no correlative public duty and the corporation was unprotected, just as in *Palmer* v. *Grand Junction Ry. Co.* (2), it was determined that the defendants who were authorized by their private Act to charge tolls for the conveyance of animals were not entitled to notice and a three months' limitation of action under s. 214 of that Act. That was a case in which certain horses were being carried by the defendants as common carriers and were injured by their negligence. Parke B. said, "If the action was brought "against the railway company for the omission of some duties "imposed on them by the Act, this notice would be required ". . . . But when the matter is looked at and explained, it "appears that the action is not of that nature, but the "defendants are sued as common carriers . . . . and it "appears to me that a breach of their duty in that character "is not a thing omitted to be done in pursuance of the Act or "in the execution of their powers or authorities given by it.

(1) [1916] 1 A. C. 242, 263.

(2) (1839) 4 M. & W. 749.

"The Act does not compel them to be common carriers: it "only enables them to be so, so far as they shall think fit; and "when they have elected to become so, they are liable in that "character, in the same way as other common carriers are." In neither case were the defendants in performing the act complained of carrying out a public duty—in each they were acting in pursuance of a private contract.

Finally it was argued that the invitation to Mrs. Griffiths was not issued in direct performance of a public duty but was merely an act incidental to its performance and as such unprotected. *Clarke* v. *St. Helens Borough Council* (1) was quoted in support of this argument. For my own part I doubt if the addition of the epithet " direct " adds clarity to the meaning of the word " performance," nor is the use of the word " incidental " very helpful. It has still to be determined what is " incidental " and what is " direct." I can only say that in the present case I find myself in agreement with the Master of the Rolls when he says " It is not right, in my opinion, "to say, as was said by counsel for the appellant, that one "must be able to put one's finger upon some specific duty in "the Act before the Act can apply. Acts of Parliament which "impose public duties do not, as a rule, concern themselves "with details. There are many different ways of carrying "out a public duty, and, with regard to any step, it is almost "always possible to say that it is optional. The point of the "matter is what were they doing when they issued this "invitation . . . . Were they carrying on a public elementary "school in execution of the Act? The answer is that they "were." Like the learned judge and the Court of Appeal I think that the invitation was issued in performance of a public duty and if the adjective " direct " is thought to add greater exactitude, then its issue was in direct performance of such a duty.

In *Fielding* v. *Morley Corporation* (2) Lindley L.J. foresaw that " some day there will probably be a great discussion as to " what acts or defaults do or do not come within it " (i.e. within the Public Authorities Protection Act). In *Bradford*

---

(1) 85 L. J. (K. B.) 17.

(2) [1899] 1 Ch. 1; [1900] A. C. 133.

H. L. (E.)
1940
GRIFFITHS
v.
SMITH.
Lord Porter.

Corporation v. *Myers* (1) Lord Buckmaster said he was conscious that his opinion did not establish so clear and distinct a line as he would wish to see and in *Edwards* v. *Metropolitan Water Board* (2) Scrutton L.J. found the same difficulty. Some principles have been and can be laid down which may assist in the application of the Act, but like Lord Haldane in the former case I doubt whether it ever will be possible to lay down some general principle by which all cases can be tested. At any rate it is unnecessary to make the attempt in the present instance. Enough has been said to show your Lordships why I agree with the courts below in thinking the action fails and the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Silverman & Livermore.*

Solicitors for respondents: *Preston, Lane-Claypon & O'Kelly, for Gamon, Arden & Co., Liverpool.*

(1) [1916] 1 A. C. 242, 247. (2) [1922] 1 K. B. 291, 303.

[HOUSE OF LORDS.]

H. L. (E.)* POTTS . . . . APPELLANT;

1940

AND

July 30, 31; Aug. 1, 6, 7; Dec. 9. HICKMAN . . . . RESPONDENT.

Landlord and Tenant—Arrears of rent—Distress for rates under justice's warrant—"Execution"—Priority—Landlord and Tenant Act, 1709 (8 *Anne c.* 14), *s.* 1—*Distress for Rates Act,* 1840 (12 & 13 *Vict. c.* 14), *s.* 1.

The levying of a distress for poor rates under a justice's warrant is not an "execution" within s. 1 of the Landlord and Tenant Act, 1709, and, consequently, is not subject to a preferential claim by the landlord of the premises for rent.

Decision of Court of Appeal ([1940] 1 K. B. 29) reversed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of the judge of Wolverhampton County Court.

The plaintiff in the action, Mrs. Frances Mary Hickman, was the landlady of 366, Dudley Road, Wolverhampton, let on a quarterly tenancy to one Townsend at a rent of 5*l.* 7*s.* a quarter. The tenant fell into arrear with the rent, and as the house was controlled under the Rent Restriction Acts, the plaintiff applied to the county court under those Acts on August 10, 1938, and obtained an order for leave to distrain, which, however, was suspended so long as the tenant paid 15*s.* per week off the arrears, and the rent as it became due. The tenant having made default, the plaintiff was on September 29 in a position to distrain for a sum agreed at 15*l.* 11*s.* Meanwhile, on September 20, the defendant, as bailiff for Wolverhampton Corporation, levied on the tenant under a warrant of distress for rates granted by a justice of the peace for the borough on August 11, pursuant to the Distress for Rates Act, 1849. The plaintiff's solicitors on October 4 gave notice to the defendant that their client claimed the amount due for rent as a first claim on the assets, by which

(1) [1940] 1 K. B. 29.

**Present:* VISCOUNT SIMON L.C., VISCOUNT MAUGHAM, LORD THANKERTON, LORD WRIGHT and LORD ROMER.

was meant the proceeds of the sale of the distress, and, as the defendant refused to recognize this claim, this action was brought. The plaintiff's claim was based on the Landlord and Tenant Act, 1709 (1) (8 Anne, c. 14; c. 18 in the Revised Statutes) and the only point which fell to be determined was whether the levying of a distress for rates under a justices' warrant was an execution within s. 1 of that Act. The county court judge held it was not; the Court of Appeal held that it was. The defendant appealed.

R. M. Montgomery K.C. and *G. D. Squibb* (for *Peter Thorneycroft*, absent on war service) for the appellant. The question is whether the levying of a distress for rates under a justice's warrant is an "execution" within s. 1 of the Landlord and Tenant Act, 1709. We submit that it is not inasmuch as replevin is not available in such a case: see Comyn's Digest, tit. Replevin D. Further, an "execution" is founded on the judgment of a court which is not the case here. No claim such as is now made has ever been suggested in any treatise on Landlord and Tenant.

(1) Landlord and Tenant Act, 1709 (8 Anne c. 14), s. 1: "For "the more easy and effectual "recovery of rents reserved on "leases for life or lives, term of "years, at will or otherwise; be "it enacted . . . . that from and "after [May 1, 1710] no goods or "chattels whatsoever, lying or "being in or upon any messuage, "lands or tenements, which are "or shall be leased for life or lives, "term of years, at will or other-"wise, shall be liable to be taken "by virtue of any execution on "any pretence whatsoever, unless "the party at whose suit the said "execution is sued out, shall "before the removal of such goods "from off the said premises, by "virtue of such execution or "extent, pay to the landlord of "the said premises or his bailiff, "all such sum or sums of money "as are or shall be due for rent "for the said premises at the time "of the taking such goods or "chattels by virtue of such "execution: Provided the said "arrears of rent do not amount "to more than one year's rent; "and in case the said arrears shall "exceed one year's rent, then the "said party, at whose suit such "execution is sued out, paying the "said landlord or his bailiff one "year's rent, may proceed to "execute his judgment, as he "might have done before the "making of this Act; and the "sheriff or other officer is hereby "impowered and required to levy "and pay to the plaintiff as well "the money so paid for rent as "the execution money."

[VISCOUNT SIMON L.C. I observe that in *Rex* v. *Gillespie* (1) Mr. Danckwerts contended that "subject to proof of the rate "having been legally made, and of its being one which the "defaulting ratepayer is legally liable to pay, the magistrate "in issuing a distress warrant acts ministerially. He has no "discretion as to whether he will issue it or not. He does not "for the purpose of hearing the application sit as a court of "summary jurisdiction: *Reg.* v. *Price* (2). The money is not "recoverable through any order of his; 'the rate itself is the "'order'" per Cockburn C.J.]

In Les Termes de la Ley "execution" is stated to be "where judgment is given in any action, that the plaintiff "shall recover the land, debt or damages, as the case is; and "when any writ is awarded to put him in possession, or to "do any other thing whereby the plaintiff should the better "be satisfied his debt or damages, that is called a writ of "execution." In other words, "execution" is the enforcement of a judgment. In *Lee* v. *Lopes* (3) Lord Ellenborough is quoted as having said that "a commission of bankrupt had "been sometimes called a statutable execution: but though it "might be said to be similitudinary to an execution, it was "not an execution." So in *Brandling* v. *Barrington* (4), Lord Tenterden C.J. said (5): "Now the statute speaks only of "goods taken by virtue of any *execution*, and the plain sense "of the words is confined to executions on judgments. The "process under which the sheriff seized and sold the goods in "question was not process of execution on a judgment." A distress for rates does not come within that definition; it is not grounded upon an order or judgment of a court: see also Coke upon Littleton, book 2, c. 12, s. 233. We rely on s. 10 of the Summary Jurisdiction Act, 1884, which provides that "nothing in this Act shall alter the procedure for the recovery "of or any remedy for the non-payment of any poor rate, or "of any rate or sum the payment of which is not adjudged "by the conviction or order or a court of summary jurisdiction."

---

(1) [1904] 1 K. B. 174, 177.
(2) (1880) 5 Q. B. D. 300.
(3) (1812) 15 East 230.
(4) (1827) 6 B. & C. 467.
(5) Ibid. 475.

This is not an order or an adjudgment by a court of summary jurisdiction which says that the ratepayer is indebted in a particular sum of money. The justices merely gave authority to do something when certain facts were put before them. In several respects the justices in this matter are not acting as a court of summary jurisdiction; they are only giving authority when certain facts are put before them. In the case of a poor rate there is no action. An overseer asks the justices to give him authority to carry out his duty; but he is not a plaintiff, nor does he become a defendant; he merely informs the justices that a certain sum has been assessed on A. B. and it is his (the overseer's) duty to collect it.

A. T. Denning K.C. and *Robert Fortune* for the respondent. Two matters arise for consideration, namely (*a*) the construction of the Act of Anne, and (*b*) the nature of a distress for rates. In the Act of Anne the governing words are "any execution "on any pretence whatsoever," and these are not limited by the subsequent words. In the Act the word "suit" is not used in its modern sense of "action," but in its old sense of "prayer," that is, request: see *Altham's* case (1). The section says "at," not "in" whose suit. The words "sued out" mean "issued out," and the word "extent" affords guidance, a writ of extent being one by which certain debts were directed to be levied by seizure and sale of the debtor's property without any judgment. For instance, an "extent in chief" issued for the recovery by the Crown of a debt due to it; an "extent in aid" issued for the recovery by a Crown debtor of a debt due to him by a third person, and an "extent" issued for the recovery by a private person of a debt due to him on a recognizance made by the debtor under statute merchant or statute staple. In order to obtain a writ of extent the creditor had simply to apply for it, and it was granted on his affidavit without any judgment, sometimes ex parte in case of urgency, but usually a scire facias issued to afford the debtor an opportunity of showing cause why the writ should not issue: see Blackstone iii., 420;

(1) (1610) 8 Co. Rep. 148a, 153b.

Comyn's Digest "Statute Merchant"; Tidd's Practice; and West on Extents. It has been held that the word "extent" applies to extents of a private nature, such as statute merchant or statute staple: see *Rex* v. *de Caux* (1), showing the wide scope of the general words "any execution on any pretence "whatsoever," for they include "extent" in which there was no action and no judgment other than a direction that the writ should issue. The word "plaintiff" means the party at whose suit the execution is issued out: see *Henchett* v. *Kimpson* (2) where it was said "the statute shall have a "liberal construction," and it was in fact liberally construed in early days: see *Greaves* v. *D'Acastro* (3) and *Dixon* v. *Smith* (4). A distress for rates falls within the Act of Anne, being an "execution," and the rating authority being the "party at whose suit the execution is sued out." Further, the justices' decision to grant the warrant is a "judgment"; the amount for which the warrant is granted is the "execution "money"; while the person to whom the warrant is directed is an "officer," he being the justices' officer pro hac vice. In 1685 a distress for poor rates was described by Saunders C.J. as an "execution": see his Observations on the Statute of 22 Car. II., c. 1, p. 39. In 1699 Holt C.J. said that "when "a statute says money 'shall be levied by distress' this is "an execution"; see *Rex* v. *Speed* (5). At p. 11 of his book on distress Gilbert C.B. drew a distinction between distress for rent service and distress for fines and amerciaments in Courts Leet, and said that the latter are to be "esteemed in "the nature of an execution": see also per Lord Mansfield C.J. in *Hutchins* v. *Chambers* (6). It has long been held that the proceedings before the justices are a judicial proceeding, and that the debtor must first be summoned so that he can be heard: see *Tracy* v. *Talbot* (7), as explained in Burn's Justice (1755), p. 354; *Rex* v. *Benn and Church* (8); and *Harper* v. *Carr* (9). As early as 1706 the decision of the justices was described by

(1) (1815) 2 Price 17.
(2) (1762) 2 Wilson K. B. 140.
(3) (1725) Bunb. 194.
(4) (1818) 1 Swanst. 457.
(5) (1699) 12 Mod. 328.
(6) (1758) 1 Burr. 579, 588.
(7) (1705) 2 Salkeld 532.
(8) (1795) 6 Term. Rep. 198.
(9) (1797) 7 Term. Rep. 270.

the Court of King's Bench as a "judgment": see *Reg.* v. *Hedges* (1). That the justices in such matters sit judicially is fully established; they can state a case: see *Fourth City Mutual Building Society* v. *East Ham Churchwardens* (2); they can determine the amount due: see *Mansel* v. *Itchen Overseers* (3); they can consider many defences: *Whenman* v. *Clark* (4); and their judgment makes the matter res judicata: *Kershaw, Leese & Co.* v. *Stockport Overseers* (5). It is true that no action lies for poor rates: *Liverpool Corporation* v. *Hope* (6), but that does not affect the present case, as there are many local statutes by which rates or charges can be recovered in the manner in which poor rate is recovered, or by action in any competent court. If recovered by action the statute of Anne would apply so as to give the landlord priority for his rent, but it would be anomalous if the creditor could obtain priority over the landlord by proceeding before justices. The fact that replevin is available for a distress for rates does not affect the position, replevin being only available in the case of an inferior court, namely, when acting in excess of its jurisdiction: see *George* v. *Chambers* (7) and *London County Council* v. *Hackney Borough Council* (8). No distinction in principle can be drawn between proceedings before justices for rates and proceedings for any civil claim cognizable by them. In Australia it has been held that a warrant of distress issued by justices to enforce a civil debt is an "execution" within the Act of Anne: see *Winslow* v. *Wilson* (9), and although that decision may have been influenced by Australian legislation, it should apply here as it would be anomalous if priority for a civil claim should depend on whether proceedings are taken before justices or in the county court.

R. M. Montgomery K.C. replied.

The House took time for consideration.

---

(1) (1706) 2 Salkeld 533.
(2) [1892] 1 Q. B. 661.
(3) [1906] 1 K. B. 221.
(4) [1915] 1 K. B. 548, 588.
(5) [1923] 2 K. B. 129.
(6) [1938] 1 K. B. 751.
(7) (1843) 11 M. & W. 149, 159.
(8) [1928] 2 K. B. 588.
(9) (1938) 54 C. L. R. 554.

H. L. (E.)
1940
POTTS
v.
HICKMAN.

1940. Dec. 9. VISCOUNT SIMON L.C. My Lords, the remarkable feature of this appeal is that the question it raises has never been raised and decided before.

The occupier of a house in Wolverhampton was behindhand both with his rent and with the payment of his rates. When the appellants, as bailiffs for the corporation, levied for the rates on the occupier's goods and chattels under a warrant of distress, which had been granted by two justices of the peace for the borough, the respondent as landlord of the premises gave notice to the appellants claiming that the rent then due and payable constituted, under s. 1 of the Landlord and Tenant Act, 1709 (8 Anne, c. 14 ; c. 18 in the Revised Statutes), a first claim on the proceeds of sale. This claim was resisted and in the Wolverhampton county court Judge Tebbs dismissed it as unfounded. The Court of Appeal took a different view, and held that the landlord's claim was justified. We now have to decide which view is right.

The Elizabethan Poor Law Act of 1601 (43 Eliz. c. 2), authorizing the levying of distress for poor rates, and the statute of 1709, "for the better security of rents, and to "prevent frauds committed by tenants," which requires an execution creditor to pay to the landlord certain arrears of rent in priority to levying execution upon the tenant's goods and chattels, have lived side by side for over 230 years. Hitherto no one—text-writer, litigant, or judge—has ever suggested that the latter statute controlled the former, i.e., that the exaction of unpaid rates by means of a distress warrant was subject to the condition that the rating authority should first provide for unpaid rent due to the landlord. Comprehensive digests of the law of rating and of the law of landlord and tenant respectively, with every case noted—βιβλία αβιβλία as Charles Lamb would call them—are on the shelves of every law library, but nowhere in either class of work is the suggestion to be found that the law of rent and the law of rates impinge at this point. Neither, so far as can be ascertained, is past or present practice in accordance with the contention of law now put forward by the respondent. Nevertheless, if upon its proper construction the Act of Anne

H. L. (E.)
1940
POTTS
v.
HICKMAN.
Viscount Simon L.C.

authorizes and requires that this contention should be accepted, accepted it must be, and past failure to appreciate the true operation of the statute does not affect the conclusion at all.

The House has been much assisted by the learning and research of counsel on both sides, and we further have the advantage of the full and carefully reasoned judgment of Goddard L.J. delivered on behalf of the Court of Appeal. If the test which would determine the present controversy were completely stated by asking whether the lawyers of 1709 would have regarded the levying of a distress of rates as an execution, there would indeed be a great deal to be said for the learned Lord Justice's conclusion. Ten years before the Act of Anne was passed, Holt C.J. in the deer-stealing case *Rex* v. *Speed* (1) had said that "when a statute says money "'shall be levied by distress,' that is an execution." In *Hutchins* v. *Chambers* (2), where the question was whether beasts of the plough were privileged from distress for poor rates and it was decided that they were not, Lord Mansfield quotes with approval the following passage from 3 Salkeld, p. 136: "This common-law exemption of utensils, tools, "instruments of husbandry etc. from distress holds only in "distress for rent arrear, amerciaments etc., but doth not "extend to cases where a distress is given in the nature of "an execution by any particular statute; as for poor rates." "Therefore," adds Lord Mansfield, "it is more analogous to "an execution than to a distress at common law, and there "(in cases of execution) averia carucae may be distrained; "although there be other sufficient distress."

At the end of the eighteenth century yet another Chief Justice affirmed the analogy. In *Rex* v. *Benn and Church* (3), Lord Kenyon said that a warrant of distress for poor rates was "in the nature of an execution."

If, however, all that was necessary to bring distress for rates within the scope of the statute of Anne was to realize that distress for rates might be regarded as "in the nature of an "execution," why has the enforcement of payment of rates

(1) 12 Mod. 328, 330.
(2) (1758) 1 Burr. 579.
(3) (1795) 6 Term. Rep. 198.

by distress warrant gone on to this day without regard to the landlord's claim for rent overdue? The answer is that the decisive question is not whether distress for rates can be regarded as a form of execution, but whether it should be regarded as execution within the meaning of s. 1 of the Landlord and Tenant Act, 1709. It is the language of the section (which is far from being well drawn, according to modern standards) and not the abstract question whether certain forms of distress approximate to execution, which must determine the issue.

The words of the section indicate that the sort of execution which it contemplates should fulfil these conditions: (1.) it must have been "sued out" by a "party." (2.) After providing for the prescribed arrears of rent "the said party, at "whose suit execution is sued out . . . . may proceed to "execute his judgment." (3.) The process, when executed by the "sheriff or other officer" should result in payment "to the plaintiff" of the "execution money."

This phraseology is entirely suitable to the execution of a writ of fi. fa. In *Henchett* v. *Kimpson* (1), Pratt C.J. said with reference to the word "plaintiff" in the last limb of the section "the statute shall have a liberal construction; and the "words 'party at whose suit the execution is sued out' etc. "shall be construed to mean either plaintiff or defendant, whose "judgment and execution it is." What is contemplated is that the successful party in a litigation who has obtained judgment follows this up by "suing out" execution upon his judgment for the amount of money so awarded, i.e., the "execution money." The proceedings are contemplated as composed of two steps in succession, the first ending in judgment between the parties for a sum of money (damages or costs or both), and the second consisting in the successful party enforcing his judgment by execution. The distinction between these two steps is made plain in *Altham's* case (2). What is essential is that there should have first been a judgment inter partes on the basis of which execution can be sued out. An example of the distinction is furnished by the case of

(1) 2 Wilson K. B. 140, 141.

(2) 8 Co. Rep. 148a, 153b.

Brandling v. *Barrington* (1), where goods upon a farm were seized by the sheriff, by virtue of a writ of pone per vadios issued out of the court of pleas at Durham to compel appearance, and upon default of appearance by the occupier, were assigned by order of the bishop to the party at whose suit the writ had been issued in satisfaction of his damages. The landlord brought an action against the sheriff charging him with having removed the goods from the farm without having paid to the landlord six months' rent then due. Lord Tenterden C.J. held that the plaintiff was not entitled to recover, as the process under which the sheriff seized and sold the goods was not process of execution on a judgment.

If we apply these tests to a distress warrant for poor rates, it appears to me to be clear that such a distress is not an execution within the scope of s. 1 of the Act of Anne. In the case of rates there is no previous judgment inter partes before the execution is applied for: the liability of the occupier to pay the sum at which he is assessed for rates is not due to an action as the result of which he has been adjudged to pay the amount. Rates, indeed, cannot be recovered by action: *Seaman* v. *Burley* (2). It is the making of the rate and the assessment of the occupier which constitute liability, though even after distress the occupier has the opportunity of challenging liability by action of replevin—which itself is inconsistent with the notion that the process is collecting " execution money " as the result of a " judgment " in favour of a successful " party."

I agree with Goddard L.J. that justices, when granting a distress warrant for rates, are proceeding judicially. They have to be judicially satisfied that the rate has been duly made and published and that the person summoned has been duly rated and has not paid. The Act of Elizabeth does not contain a provision requiring the alleged offender to be first summoned before the justices, but at any rate from the beginning of the eighteenth century there are decisions which point out that if he is not first given an opportunity of explanation this would amount to punishing him unheard.

(1) (1827) 6 B. & C. 467.

(2) [1896] 2 Q. B. 344, 347.

Thus, four years before the Landlord and Tenant Act, 1709, was passed, Holt C.J. had before him the case of *Tracy* v. *Talbot* (1). It is very briefly reported in Salkeld, but in Burn's Justices of the Peace, vol. iv., sub voce "poor," at p. 354, there is a passage from the Chief Justice's judgment as follows: "Holt, C.J. The rate cannot be distrained for by virtue of "a general warrant made before the rate: but there ought to "be a special warrant on purpose; that is to say, the non-"feasance of the party shall not be left to the judgment of the "officer, who may, out of private resentment, sell his neigh-"bour's goods without sufficient cause; but oath of the "refusal must be made before the justices. And it is reasonable "that the party should be heard in his defence; for he may "show cause variously why a distress should not be granted; "as that the rate was not regularly allowed, or was not "published in the church, or that he had given notice of appeal, "or that no demand or refusal had been made, and the like."

A much later decision, which shows how strongly the view was held that the alleged defaulter must first be summoned, is that of the Court of King's Bench in *Rex* v. *Stafford Justices* (2). By a local Act for paving the town of Stafford, commissioners were authorized to make rates and in case any person rated should neglect to pay his rates for seven days after demand, it should be lawful for any justice, upon proof on oath of such demand and non-payment, by warrant to authorize the collector to levy the rate by distress and sale, and in case there should be no distress to commit the party to gaol. The magistrates refused to issue a distress warrant without previously issuing a summons to the party of whom complaint was made. A mandamus was applied for to compel the justices to issue their warrant without any previous summons, but the mandamus was refused. And it was refused on the ground that the case was exactly analogous to that of poor rate. Lord Denman said that it was impossible to distinguish the private Act from the 43 Eliz. c. 2, and that in both cases "the magistrates should issue a summons, "not by way of exercising any authority over the rate,

(1) (1705) 2 Salkeld 532.

(2) (1835) 5 N. & M. 94.

"but, admitting the rate to be valid, to call on the party "to show cause why his proportion of it is unpaid." Patteson J. says (1): "The fourth section of the 43 Elizabeth chapter 2 is "analogous to the clause in this Act, and it has been held that "before the magistrates issue a distress warrant for a poor "rate they should summon the party." Littledale J. said: "I cannot distinguish this Act from the 43 Elizabeth chapter 2." It seems to me, therefore, that the decision in *Rex* v. *Stafford Justices* (2) amounts, whether rightly or wrongly, to an interpretation of 43 Eliz. c. 2 to the effect that a summons should precede the warrant, as is now laid down by statute (Distress for Rates Act, 1849, 12 & 13 Vict. c. 14).

But while the justices act judicially in granting a distress warrant for rates, and although they give the alleged offender the opportunity of being heard, their conclusion, as I have indicated above, ought not to be regarded as a judgment inter partes. The distress warrant, albeit "in the nature of an "execution" is not a process to enforce payment of a debt ascertained by a previous judgment. The duty to pay rates does not depend on an adjudication between litigants, but upon the making of the rate by the Rating Authority.

In the course of the argument, consideration was given to the reference in s. 1 of the statute of Anne to "extent." The reference is faulty, for if "extent" was to be mentioned at all, it ought to be first mentioned earlier in the section. The writ of extent is a remedy to recover debts of record due to the Crown, and inasmuch as s. 8 of the statute expressly excludes from its scope any levying, recovering, or seizing of crown debts, it is not easy to see the usefulness of the reference to "extent" in s. 1. Of the two kinds of extent, extent in chief would be plainly excluded by s. 8, but there was also a process known as extent in aid, which issues at the suit of a crown-debtor against a person indebted to himself. It was decided, however, by the Court of Exchequer in *Rex* v. *De Caux* (3) that a landlord had no right to claim rent from the sheriff who had seized goods under an extent in aid, since this

(1) (1835) 5 N. & M. 99.
(2) Ibid. 94.
(3) 2 Price 17.

too was an exercise of prerogative power. "As to the word "extent used in the clause," said the Court, "that might be "satisfied by applying it to such as were of a private nature." The reference appears to be to writs in the nature of extents, which were formerly issued as writs of execution for private persons in order to obtain satisfaction of a debt due on recognizances or debts acknowledged on statutes merchant or statutes staple. Blackstone in his Commentaries (vol. iii., 420) gives this as one of the five forms of execution available in actions where money is recovered as a debt or damages. Whatever be the reason for including a writ of extent in the statute of Anne, it does not appear to me that this circumstance enlarges the conditions which must be fulfilled by executions properly so called if they are to comply with the language of the section.

Neither does the phrase in the section "any execution on "any pretence whatsoever" operate to enlarge the meaning of "execution" if the conditions of the section are to be satisfied. It may well be that the phrase is to be explained by recalling the words of Tindal C.J. in *Taylor* v. *Lanyon* (1) that the statute of Anne "was passed to protect the landlord "against frauds which might be committed by his tenants, "particularly by those colluding with creditors to issue writs "of execution; for property so in the custody of the law "could not be distrained, and the judgment creditor, by "keeping possession for a length of time, might seriously "affect the interests of the landlord." If such is the purpose of the statute, then there would be no point in including distress for rates as one of the forms of execution, the operation of which is postponed to the landlord's rights, for occupiers could hardly act in collusion with rating authorities for the purpose of defrauding landlords of their rents.

I move that this appeal be allowed with costs here and in the Court of Appeal, and that the county court judge's judgment in favour of the appellants with costs be restored.

VISCOUNT MAUGHAM. My Lords, the respondent is the

(1) (1830) 6 Bing. 536, 544.

H. L. (E.)

1940

Potts
v.
Hickman.

Viscount Maugham.

owner of premises, No. 366, Dudley Road, Wolverhampton, which were let to Miss Mary Ann Townsend at the rent of 5*l*. 7*s*. a quarter. The Rent and Mortgage Interest Restrictions Acts 1920 to 1933 applied to the premises. Miss Townsend fell into arrears with her rent and on August 10, 1938, leave was granted to the respondent to levy a distress for rent amounting to 13*l*. 10*s*., suspended so long as Miss Townsend paid 15*s*. a week off the arrears and a quarter's rent when due. After two payments she made default; and on September 29, 1938, the sum of 15*l*. 11*s*. was due and payable by her to the respondent.

Unfortunately she was at the same time unable to pay the rates and water rent in respect of the same premises to the rating authority, the mayor, aldermen and burgesses of the county borough of Wolverhampton. The amount payable was 6*l*. 5*s*. in respect of rates, and 19*s*. 3*d*. for water rent which by the local statutes is recoverable in the same manner as rates.

After a complaint duly made by the rating authority to a justice of the peace of the borough, a summons was served on Miss Townsend; and on August 11, 1938, a distress warrant in the form prescribed by the Distress for Rates Act, 1849, was addressed "to the Rating Authority for the County "Borough of Wolverhampton and to the Constables and other "Peace Officers of the said County Borough." By this warrant, after the usual recitals, it was commanded in His Majesty's name that distress of the goods and chattels of the persons named in the schedule should forthwith be made and, in default of payment within five clear days of the sums set opposite the names of such persons together with the reasonable charges of taking and keeping the said distress, that then the goods and chattels of the person so making default should be sold with the necessary consequential directions. The name and the residence of Miss Townsend were stated in the schedule and also the sums above mentioned making the total of 7*l*. 10*s*. 4*d*.

The appellant, who is an auctioneer by profession and the duly appointed agent and bailiff of the rating authority, on

September 20, 1938, levied a distress on the goods and chattels of Miss Townsend at 366, Dudley Road. This was done on instructions received from the rating authority and in pursuance of the distress warrant.

On October 4 the appellant received notice from the solicitors of the respondent that the sum of 15*l.* 11*s.* was due to her for rent of the premises and that she had obtained leave to distrain for that sum. They accordingly claimed payment of that amount. The appellant sold the goods and chattels seized by him by public auction on the premises on October 11, 1938. They realized the sum of 6*l.* 5*s.* 6*d.*, which it is admitted was their true value. The appellant had incurred costs in connection with the distress to the amount of 6*s.* 1*d.* before he had received notice of the claim for rent. The appellant declined to pay the rent or any part of it to the respondent. Proceedings were than commenced in the Wolverhampton County Court by the appellant against the respondent. The learned county court judge held that the Landlord and Tenant Act, 1709 (8 Anne c. 14; c. 18 in the Revised Edition), s. 1 did not apply, since the distress was not, in his opinion, an execution within that section. On appeal to the Court of Appeal (Scott, Clauson and Goddard L.JJ.) a different view was taken, and in a very clear and lucid judgment delivered by Goddard L.J., it was held that the distress warrant was an execution of the judgment of the two justices who authorized it. They accordingly allowed the appeal and ordered judgment to be entered for the respondent for the sum of 4*l.* 12*s.* 6*d.* (agreed damages and costs of action) and the costs of appeal. Leave to appeal was given.

My Lords, it is evident that the amount involved is lamentably small, and I cannot help expressing my regret that it was not found possible to make further concessions to the unlucky tenant and thus to save a much larger sum in costs; but the question involved is of considerable public interest and importance. It is, moreover, stated that each side has, or has had, the support of an appropriate association. The question which arises is as to the true construction of s. 1 of the Landlord and Tenant Act, 1709, which I shall call

H. L. (E.)
1940
POTTS
v.
HICKMAN.
Viscount Maugham.

"the statute of Anne," namely, whether the levying of a distress for rates under a justice's warrant is an "execution" within the meaning of that section. It is a fact, though for my part I am not disposed to lay too great stress upon it, that for two hundred and thirty years the contrary view has apparently obtained throughout the legal profession, with the consequence that no landlord has hitherto claimed to be entitled to the benefit of the section at the expense of the rating authority. At any rate there is no report of any such attempt, though there are a number of reported cases dealing with other points arising under the section. My feeling that this sleeping dog might well have been allowed to lie for another century or two has been mitigated by the circumstance that the question is one of considerable legal interest, and that it has been admirably argued on both sides.

I will not repeat the terms of s. 1 of the statute of Anne: but it may be useful to say a word as to the position of the landlord as regards execution on a judgment such as execution on a writ of fieri facias, before the statute of Anne was passed. The goods seized by the sheriff as from that moment and (if and when there was a sale) for a time after the sale sufficient to enable the purchaser to remove the goods, were considered as being in custodia legis and therefore exempt from distress by the landlord: Gilbert on Distress, 3rd ed., p. 40; and see also the opinions of the judges in the case of *Giles* v. *Grover* (1). A writ of execution, it will be remembered (with exceptions immaterial for the present purpose), is a command by the King to an officer of great antiquity, namely the sheriff, in an ancient form and it is "tested" in the name of the Lord Chancellor. The writ must be executed by the sheriff or the under-sheriff or by the bailiff (whether a bound bailiff or a special bailiff), an officer whose authority is a warrant addressed to him by name by the sheriff or the under-sheriff. The main trouble of the landlord before the statute of Anne, was that, as pointed out by the Lord Chancellor, the tenant, if he could get a friend to commence a collusive action and then to put in the sheriff, was able to defy the landlord so far as his remedy by distress was concerned: *Taylor* v. *Lanyon* (1). It was, partly at any rate, to remedy this mischief that the statute of Anne was passed. This statute as pointed out by Lindley M.R., in his judgment in *In re Mackenzie* (2) did not give the landlord a right to distrain if the sheriff had seized; but it prohibited the removal of the goods seized by him until the landlord's rent in arrear (not exceeding one year's rent) had been paid by the execution creditor. The curious results which followed from this method of protecting landlords are stated in the judgment of Lindley M.R., and I will not repeat what is there explained in such clear language; but it is useful to remember that, unless the execution creditor (or the tenant) paid the landlord his rent in arrear, the Act would often produce a deadlock. The sheriff could not be compelled by the landlord, either to sell the goods, or to withdraw from the premises. Ultimately, it became the regular practice for the sheriff to sell or to deliver the goods and to pay the landlord out of the proceeds; but this, strictly speaking, was illegal.

---

(1) (1832) 1 Cl. & Fin. 72.

My Lords, in an endeavour to answer the question which lies before us we must put out of our minds statutes passed after the year 1709, and we must be careful in applying later decisions of the courts to see that they would probably have been the same in that year. It is, moreover, clear that the question is not as to the general meaning of the word "execution" in 1709, but as to its particular meaning in s. 1 of the statute of Anne.

The first observation I shall make is that there was no special reason in 1709 for protecting landlords in a parish, who would generally themselves be ratepayers, against distress warrants for rates granted by two justices of the peace for the benefit of the parish. It cannot be supposed that such distresses, which, according to the Act of Elizabeth, had necessarily to be followed by sale of the goods, could be put in for the purpose of protecting the tenants. We ought not therefore to approach the problem before us with the notion that the legislature when using the word "execution" in the section was deliberately intending by the word to include any distress authorized by statute. Such words as "or other process, "warrant or authority" might easily have been added to the word "execution," as in fact they were in the Act 43, Geo. 3, c. 99, s. 37. It is, however, the language of the statute of Anne which mainly requires examination. We find there that the execution is one "sued out by a party," that that party is to pay the rent due to the landlord (not exceeding one year), that he may then "execute his judgment," and that "the sheriff or other officer" is empowered "to levy and "pay to the plaintiff the money paid for rent and the execution "money." It may be mentioned here that it was held in the case of *Henchett* v. *Kimpson* (1) that the reference to a plaintiff should be construed to include "either plaintiff or defendant "whose judgment and execution" it was, with the result that a defendant putting in an execution for costs awarded to him was held bound by the provisions of the statute. That, however, does not I think affect the present question.

---

(1) 6 Bing. 536, 544.

(2) [1899] 2 Q. B. 566, 574.

My Lords, I think it is clear, and Goddard L.J. accepts that view, that the statute of Anne is dealing only with executions under a judgment, since there must be a party at whose suit execution is sued out, and he is to be a person entitled to "execution money." "The plain sense of the "words," as Lord Tenterden C.J. remarked in *Brandling* v. *Barrington* (2) "is confined to executions on judgments." It was on that ground that the court held in that case that goods taken under the now obsolete writ of pone by the sheriffs of the County Palatine of Durham, though what was done had "the effect of an execution" was not in fact an execution under a judgment, since it was issued like the writ of distringas for the purpose of compelling an appearance. We may therefore formulate the question in this form: was the warrant of distress for rates in 1709 a process of execution on a judgment? The section contemplates that there will be a plaintiff or a defendant, and it seems therefore that the judgment must be inter partes. The position of the churchwardens and overseers of the parish in the reign of Queen

(1) 2 Wilson K. B. 140.

(2) 6 B. & C. 467, 475.

Viscount Maugham.

Anne was very different in some respects from that of a plaintiff in an ordinary action. The latter could, of course, pay the landlord his rent if he had the necessary money; but it is not very clear that the churchwardens and overseers had authority to make such payment out of the rates which they had collected from others in the parish. Assuming this difficulty to be got over, it is desirable to examine the nature of the poor rate and the means for recovering the sums assessed. The foundation of the liability to pay rates is to be found in the statute of Elizabeth, 43 Eliz. c. 2. By s. 2 of that Act provision is made for the making of a rate and for the recovery of rates which are unpaid. It is there provided that it should be lawful for the churchwardens and overseers of the parish " by warrant from any two such justices of the "peace . . . . to levy as well the said sums of money and all "arrearages of every one that shall refuse to contribute "according as they shall be assessed by distress and sale of "the offender's goods . . . . rendering to the parties the "overplus."

It is to be noted that there is no direction in the Act that a summons should be issued before the distress warrant is granted by the justices, and for a great many years it was not I think the law that such a summons was necessary, though it appears to have become usual in some parishes to summon the party in default as to the rate. What was necessary was to prove to the justices in the words of the statute that the party concerned, the " offender," had " refused to contribute," and it was only by gradual steps that a summons became a necessary step in the obtaining of a warrant. It may be difficult to ascertain with certainty the procedure of justices in 1709 in relation to a warrant of distress for rates pursuant to the statute of Elizabeth; but I think that there is no doubt about the practice for many years after that statute because the actual forms in use are contained in Shephard's Justice of Peace, published in 1660. In c. vi. of that work we find the form of warrant appointing persons to be overseers of the poor of a parish according to the Act of Parliament; and then (p. 34) we find the form to be used to enable a distress

H. L. (E.)
1940
POTTS
v.
HICKMAN.
Viscount Maugham.

for the poor rate to be made. It is not uninteresting and I will here state it. "W. S. and L. S., esquires, two of the "justices of the peace of the county of Gloucester. To the "churchwardens and overseers of the poor of the parish of D, "in the county of G. Whereas the persons here undernamed, "all of your parish of D, have been duly assessed the sums "of money hereunder at their names appearing and set down "and rated upon them towards the maintenance and relief "of the poor of your parish, the which rate hath been duly "confirmed by two of the justices of the peace of the said "county, according to the form of the statute in that case "provided. The which sums they are in arrear, and refuse "to pay, although the same have been demanded of them. "These are therefore to authorize and require you once more "to demand the said several sums of the said several persons "respectively: And in case they refuse to pay the same, that "then you levie it by way of distress and sale of the goods "and chattels of the persons refusing to pay the same "respectively, rendering to them the overplus according to "the said statute. And that you the same money pay and "distribute to the use of the poor of your parish according to "your office. And hereof, etc."

There are other precedents of warrants in the book showing that summonses to appear before the justices before making orders to distrain or even to commit to prison were not in all cases thought to be necessary in 1660. It must be remembered that at that date, and indeed till many years later, justices of the peace who issued a wrongful warrant of distress were liable to be sued by the injured party: see statute of Elizabeth, s. 18, *Harper* v. *Carr* (1) and 24 George 2, c. 44. The justices had good reason for being careful in such a matter. I do not doubt that the obviously just and prudent course of summoning a person refusing or neglecting to pay the poor rate was creeping in, and that by the end of the eighteenth century as the result of the decisions in *Rex* v. *Benn and Church* (2) and *Harper* v. *Carr* (1) which are cited by Goddard L.J., it was settled that a summons should precede a warrant

(1) (1797) 7 Term. Rep. 270.

(2) (1795) 6 Term. Rep. 198.

H. L. (E.)

1940

Potts
v.
Hickman.

Viscount Maugham.

of distress which as Lord Kenyon C.J. observed was "in the "nature of an execution." The law was previously in a state of doubt. I do not read the statement of Holt C.J., as cited by my noble and learned friend on the Woolsack, as deciding that a summons must precede a warrant, but rather that such a course should be taken as was directed in *Rex* v. *Benn and Church* (1). In *Rex* v. *Middlesex Justices* (2) Lee C.J. presiding in the King's Bench observed that there was no direction in 43 Eliz. c. 2, s. 4, that the defaulting party should be summoned to show cause. In *Rex* v. *Benn and Church* (1) an application for a mandamus to the justices, where there had been no summons, was at first refused by Lord Kenyon, who said that he could not agree with Lee C.J. But on the following day there was a second application for a mandamus by counsel. He stated and apparently produced many precedents of "similar writs (of mandamus) which neither stated the parties "to have been summoned, *nor required the justices to summon* "*them*. (My italics.) Upon this the Court granted a mandamus "to the magistrates (which it had previously refused to do) "to receive such informations and complaints as have "been or shall be duly laid before them against such "persons as have neglected or refused, or shall neglect or "refuse, to pay the sums respectively assessed on them . . . . "and to proceed thereupon to levy the said several sums." The Court did not in the result insist on a summons as a condition for granting a warrant of distress, though it required the justices to consider the informations and complaints.

I have also examined such early books as I can find on the Poor Laws, and in particular Carter on the Poor Laws (1710) and Foley on Laws Relating on the Poor (1739), and I cannot find any statement or suggestion that a summons was necessary when those books were written. My Lords, I have made some other researches, but I am unwilling further to take up your Lordships' time with a discussion of this point of ancient and obsolete law. All I am concerned to do is to give reasons for thinking that in 1709 there was not, in the

---

(1) 6 Term. Rep. 198.

(2) (1746) Const., 5th ed., vol. i., 250.

H. L. (E.)
1940
POTTS
v.
HICKMAN.
Viscount Maugham.

view of lawyers, so far as that can now be ascertained, a summons or anything resembling a judgment inter partes which must have preceded a warrant for the issue of distress for unpaid rates. But even if there was a summons prior to the warrant it would not in my opinion be a correct conclusion that the decision on the summons was such a judgment as the statute of Anne was dealing with. The justices no doubt on such a summons would have to be satisfied on certain matters, but if so satisfied they had no discretion and were bound to grant the warrant. In *Reg.* v. *Price* (1) Cockburn C.J. remarked " In granting a distress warrant for "a rate justices act ministerially under 43 Eliz. c. 2, s. 4, and "not as a court of summary jurisdiction." And a little later he added that the money due for the rate " was not recoverable "through an order of a court of summary jurisdiction . . . . "The rate itself is the order." The first statement I think required a little amplification and in *Ex parte May* (2) Cockburn C.J. said that the justices have to see that there is such a rate as alleged, that the party summoned is named in the rate, and that he has not paid—" after which their duty is "simply ministerial." Blackburn J., added that they have also to inquire whether the defendant is the occupier; but subject to that addition he appears to have agreed. The true view according to that case seems to be that the justices have to be satisfied on certain questions of fact which are generally free from difficulty, but subject to being so satisfied that they have no discretion, and act ministerially. If that is correct, and I think it is, it would seem to follow that the justices are performing a somewhat special and a mixed function in granting a distress warrant, and in my opinion it is straining the language of the Act of 1709 to call the decision of the justices a judgment inter partes. It is still more difficult so to describe it, if we accept the view, as in my opinion we must, that there is no judgment for the amount of the rate and no legal debt recoverable by action. As Cockburn C.J. observed in the *Reg.* v. *Price* (1) " the rate itself "is the order" There is a passage in a judgment by Lord

(1) 5 Q. B. D. 300, 301.
(2) (1892) 31 L. J. (M. C.) 161.

H. L. (E.)
1940
POTTS
v.
HICKMAN.
Viscount Maugham.

Esher M.R. in *Seaman* v. *Burley* (1) which points in the same direction. Finally it has recently been held in the Court of Appeal (Slesser, Scott and Clauson L.JJ.) that a local authority cannot sue a ratepayer either for money due or for breach of a statutory duty: see *Liverpool Corporation* v. *Hope* (2). A rate, it was held, is not a common law liability, but a mere creature of statute, and the only remedy is the statutory remedy by distress. It follows that the justices were bound at and prior to 1709 to issue the distress warrant if certain facts were proved, and that there was no judgment of any court that any money was due by the ratepayer nor was there any debt recoverable by action. There remains the circumstance that the execution is to be levied by "the sheriff or other "officer" who is given a special power to levy the money paid for rent as well as the execution money. I am not satisfied that the bailiff of the rating authority is within those words, according to their natural meaning. Such a bailiff is only the agent of the rating authority. He holds no "office," and his position in the matter is very different from that of a sheriff, an under-sheriff or his bailiff as above explained. The expression "sheriff or other officer" is generally used to denote the sheriff or other officers deriving their authority under him. I do not know any sufficient reason for extending the meaning of the phrase "sheriff or other officer" so as to include an agent appointed by a rating authority.

Some stress was laid by Mr. Denning in his able argument on the reference to extents in s. 1 of the statute of Anne. The word requires some explanation, for the writ of extent was a writ of execution against the goods (and the lands) of a crown-debtor for enforcing payment of debts due to the Crown, and the rights of the Crown are saved by s. 8 of the Act. There were, however, also writs of "extents in aid" issued against the debtor of a person, himself a crown-debtor, and they were issued at the suit of the crown-debtor in the name of the Crown: *Rex* v. *Shackle* (3), *Giles* v. *Grover* (4). Crown-debtors discovered that by an extent in aid they could more

(1) [1896] 2 Q. B. 344, 347.
(2) [1938] 1 K. B. 751.
(3) (1823) 11 Price 772.
(4) (1832) 1 Cl. & Fin. 72, 128–9.

H. L. (E.)
1940
POTTS
v.
HICKMAN.

Viscount Maugham.

conveniently collect their own private debts, and a stop was put to this practice by 57 Geo. 3, c. 117, which precluded private debtors recovering more than was due by them to the Crown. The statute of 1709 contained in s. 8 a proviso that nothing therein should prejudice Her Majesty in the recovery of any debts, fines, penalties or forfeitures due or payable to her; but it may have been thought that this would not have affected extents in aid since the sums recoverable by those writs would not be due or payable directly to the Crown. An extent was certainly a writ of execution, though usually preceded by a scire facias which enabled the debtor to dispute the existence of the debt, and a special procedure was applicable to it. It seems possible that the draftsman inserted the word " extent " in s. 1 of the Act of 1709 in order to ensure that extents in aid issued at the suit of private persons should be under the same obligation to the landlord as other execution creditors. This endeavour seems to have been unsuccessful: see *Rex* v. *Cotton* (1), *Rex* v. *De Caux* (2); but the insertion of a reference to extents in the section does not I think outweigh the other considerations which tend to show that distress warrants are not included in the word " execution."

My Lords, I do not doubt that a distress warrant for rates is analogous to and in some respects is an execution, nor that in an appropriate setting it might well be included in the word " execution." My conclusion, that it is not used in the wider sense in s. 1 of the Statute of Anne, is formed on a consideration of the surrounding circumstances in 1709 and of a number of indications in the section itself. In particular I have reached my conclusion mainly on the following grounds: first, the section is dealing only with executions on judgments in proceedings inter partes; secondly, that in the case of a distress for rates there is, or at any rate there was in the year 1709, no such judgment involved; thirdly, that a bailiff appointed by churchwardens and overseers to distrain for rates in 1709 was not within the words " sheriff or other officer " in their ordinary meaning; fourthly, if we consider the mischief which the statute of Anne was intended to remedy, that there exists no

---

(1) (1751) Parker, 112.

(2) 2 Price 17.

H. L. (E.)
1940
POTTS
v.
HICKMAN.

reason for a strained interpretation of the section for the benefit of landlords; and lastly, that for over two centuries the legal profession seems to have accepted the more limited view of the meaning of the word "execution" in the section.

On these grounds I think the appeal should be allowed, and I concur with the proposed motion.

LORD THANKERTON. My Lords, I concur in the motion proposed, and in the reasons stated by my noble and learned friend on the Woolsack.

LORD WRIGHT. My Lords, the decision of this appeal depends on the true construction of s. 1 of the Landlord and Tenant Act, 1709 (8 Anne, c. 14). The question is whether the benefit which this section granted to landlords in giving priority to their distress for rent goes beyond a priority over writs issued to execution creditors under judgments of the High Court, and extends to a priority over a distress warrant granted by justices to a rating authority in respect of arrears of rates. In short, is the levying of distress for rates under a justice's warrant an execution within s. 1 of the Act? The county court judge decided against the landlord's claim, but his decision was reversed by the Court of Appeal.

The facts are sufficiently before your Lordships, as also are the exact words of s. 1 of the Act. The distress warrant in this case followed the statutory form provided by the Distress for Rates Act, 1849. That Act fixed the procedure for giving effect to the provisions of s. 3 of the Poor Relief Act, 1601 (43 Eliz. c. 2), under which overseers by warrant from any two justices of the peace were entitled to levy by distress and sale of the offender's goods unpaid arrears of rates. Sect. 2, sub-s. 3, of the Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), preserved the existing method of levying, collecting and receiving the poor rate and applied it to the general rate prescribed by the Act. The statutory form of warrant as used in this case is included in the statement of facts and is not without significance. It was addressed to the rating authority of Wolverhampton and to the constables and other peace officers, and recited a complaint by the rating authority made to a justice that certain persons including the respondent having been duly rated and assessed to the rate had not paid but had refused. It also recited that they had been duly summoned to appear before two of the justices to answer the complaint, that it had been proved that the general rate had been duly made and published, that the respondent had been duly rated and assessed but had refused to pay the sum though duly demanded and had not shown sufficient cause for not paying. The warrant in His Majesty's name commanded the rating authority to make distress of the respondent's goods and if the rates were not paid within five days to sell the goods and chattels, retaining enough to pay the sum demanded for rates and rendering the overplus to the respondent, and if no sufficient distress were found, to certify the same to the justices, who had then power to commit the defaulter. The amount of the general rates was 6*l*. 5*s*. with 6*s*. 1*d*. for costs. The goods realized 6*l*. 5*s*. 6*d*. The respondent had claimed to levy a distress for arrears of rent amounting to 15*l*. 11*s*. and brought the action in the county court for 15*l*. 11*s*. as damages against the defendant, who as bailiff for the rating authority had levied the distress under the warrant, but had not paid it to the plaintiff to satisfy pro tanto arrears of rent. The defence was that s. 1 of the Act of Anne did not apply.

In my opinion in cases of this class the order made by the justices is made in a judicial proceeding. That it is a judicial proceeding was held in *Rex* v. *Benn and Church* (1) and in *Harper* v. *Carr* (2). These cases, in my opinion, disposed of a difficulty which had been felt whether a party against whom a distress warrant was sought should first be summoned so that he could be heard in his defence. The Act of 1601 contained no specific requirement that he should be summoned, though it did provide for distress and sale of the offender's goods and if no sufficient distress was found empowered the justices to commit the offender. But in 1705, four years before the Act of 1709, Holt C.J. had stated specifically that the party

(1) 6 Term. Rep. 198.

(2) 7 Term. Rep. 270.

should be heard in his defence. That was in *Tracy* v. *Talbot* (1) which is reported in several series of reports. All the reports quote Holt C.J. as laying down that the rate could not be distrained for by virtue of a general warrant made before the rate, but that there ought to be a special warrant for the purpose. This seems to show sufficiently that the justices had to decide judicially on the case of the particular person charged with default. But Burn in his treatise on the Justices of the Peace (a work of the highest authority, first published in 1755, some account of which and of the author is given by Holdsworth, History, xii., 332) goes on to quote more fully how Holt C.J. proceeded in the course of his ruling, "That "is to say," he observed, "the nonfeasance of the party shall "not be left to the judgment of the officer who may out of "private resentment sell his neighbour's goods without "sufficient cause; but the oath of the refusal must be made "before the justices. And it is reasonable that the party "should be heard in his defence; for he may show cause "variously why a distress should not be granted; as that "the rate was not regularly allowed or was not published in "the church, or that he had given notice of appeal, or that no "demand or refusal had been made and the like." Holt C.J. did not specify any particular procedure to secure that the alleged defaulter should be given an opportunity of being heard, but it seems that before 1746, a custom had grown up to issue to the alleged offender a summons for that purpose. In *Rex* v. *Middlesex Justices* (2) justices had refused to grant a distress warrant for rates till the party had been summoned on the ground, it was stated, of a custom to that effect. The Court of King's Bench, under Lee C.J., granted a mandamus, apparently on the ground that the statute of Elizabeth did not specify a summons as necessary. But in 1761, Wilmot J. in *Stevens* v. *Evans* (3) emphasized the established rule of the common law by observing (4) that: "it would be strange "that a distress should be taken on a man's goods without "hearing him." And in 1795, Kenyon C.J. held expressly in

---

(1) 2 Salk. 532.

(2) 1 Bott. 262.

(3) (1761) 2 Burr. 1152.

(4) Ibid. 1159.

H. L. (E.)
1940
Potts
v.
Hickman.
Lord Wright.

Rex v. *Benn and Church* (1) that a summons must precede a warrant of distress; "on the summons the party may show "a sufficient reason why a warrant of distress should not "issue." That the granting of the distress warrant was a judicial and not a ministerial proceeding was again expressly held by Lord Kenyon in *Harper* v. *Carr.* (2) He reiterated there the necessity of a summons before a warrant of distress was granted. "It is," he said, "an essential rule in the "administration of justice that no man shall be punished "without being heard in his defence." I am not here concerned with the question of the exact form of procedure in order to give the person charged an opportunity of being heard, though the procedure by summons is now statutory under the Distress for Rates Act, 1849, s. 5, under which, as already stated, the statutory forms are prescribed. It may be that, as Holdsworth, History, vol. x., 293, seems to indicate, justices in practice did not observe the true rule, or it may be that by some other means they gave the alleged delinquent an opportunity of stating his defence, at least before Lord Kenyon's ruling. But I am only at the moment engaged in ascertaining that the justices act judicially in these matters. This has been, since Lord Kenyon's judgment, recognized and laid down in a number of authorities which I need not here cite. The dictum of Cockburn C.J. in *Reg.* v. *Price* (3), that "in granting a distress warrant for a rate justices act "ministerially under 43 Eliz. c. 2, s. 4" cannot as a statement of the general law be supported. He was, however, considering the application of s. 47 of the Summary Jurisdiction Act, 1879. Whatever the difficulty was under that section it has now been removed by the amendment of the law as explained in *East Ham Churchwardens* v. *Fourth City Mutual Building Society* (4), and later cases. Even if the party summoned has no valid objection which he can raise to being rated because the facts are clear, the justices still act judicially in making the particular order of distress even though no other course is open to them judicially.

(1) 6 Term. Rep. 198.
(2) 7 Term. Rep. 270.
(3) 5 Q. B. D. 300.
(4) [1892] 1 Q. B. 661.

I proceed accordingly on the basis as did Goddard L.J. which is most favourable to the respondent that the justices act judicially in these matters. But it is necessary to consider more in detail the nature of the procedure in the granting of a distress warrant. In that proceeding the rating authority is complainant, and the order is made after the party has been duly summoned and after proof before the justices of the relevant facts to enable them to decide if the defendant ought to have been rated at all or if at all for the full rateable value. The warrant or order is a command in the King's name to the complainant and the police officers to enforce the order, that is to execute it, in accordance with the statute. It is this aspect of the proceeding which has appealed so forcibly to Goddard L.J. who delivered the decision of the Court of Appeal in an admirable judgment. But with all respect, the rock on which that good ship or vessel has, in my opinion, split, is the precise language of the statute of Anne. The learned Lord Justice, having with good cause and good authority come to the conclusion that this particular form of distress is very like an execution, has gone on to hold that as s. 1 was expressly for the more easy and effectual recovery of rents reserved, etc., it should be widely and liberally construed. But, I think, for reasons which I shall explain, that the language of the section is not such as to include a distress for rates in the execution to which it refers. There is obviously no room for an equitable or cy près construction. If the policy of the Act had been to favour the landlord against not merely an execution creditor, but against a public authority in regard to an impost necessary for public purposes, it was for the legislature if it so intended to express that intention in clear and unambiguous terms. Goddard L.J. has referred to the very striking fact that from 1709 to the present case no landlord has sought to rely on the point now raised. I agree with him that if the language were clear, that fact would not necessarily prevent the court from construing the section as the respondent now claims. At the same time the fact emphasizes the need for caution in supporting so unprecedented a claim, especially when regard is had to the enormous number of cases in which a defaulting ratepayer must also at the same time have been liable for arrears of rent to his landlord. It must also be noted that the books dealing with the law of landlord and tenant and of rating have given no countenance to the construction adopted by the Court of Appeal. Indeed there has been no trace that they have considered it at all, save that in Stone's Justices Manual, a well known work which every justice of the peace is constantly consulting, it has been stated for nearly half a century that the section does not apply to a distress for rates. This has only been altered in the seventy-second edition in 1940, since the judgment of the Court of Appeal now being considered. That admirable and useful work is not a book of authority, but it may be taken to have recorded the practice and understanding of those expert in these matters.

It is no doubt clear that a distress for rates is much more akin to an execution under a writ issued by the court than to a distress for rent or the similar distress for cattle damage feasant. Both these latter distraints are acts of self help, though the former at least is now closely regulated by statutes starting from the Statute of Marlborough, 1267. Holdsworth, History iii., 281, questions if the landlord's right to distrain was originally "a true case of self help; for it may be a survival "from the days when lords of tenants kept a court for those "tenants, and distrained by the judgment of that court, just as "in much later days the court leet distrained for the amerce-"ments inflicted by it." Whether distress for rent was or was not originally a form of self help, it undoubtedly became so and is to be distinguished from what Gilbert on Distress (p. 11, 4th ed.) calls the second sort of distress for fines and amercements in courts leet and the like which are transactions in courts of law. Gilbert goes on to say: "The process that "levies this debt [that is fines and amerciaments] is in the "books called a distress; because the lord might at common "law impound the distress until the fine was paid; but as "the distringas or levari for levying those fines and amercia-"ments issued in the King's name; and as the lord may "likewise sell this distress, it is rather to be esteemed in the "nature of an execution." Similarly the process to enforce an order of an inferior court by distress is sometimes in untechnical language called an execution; it is the executing or enforcing of the order. Thus in *Rex* v. *Speed* (1) in regard to a conviction for deer stealing under a statute which enacted that the forfeiture should be levied by way of distress, Holt C.J. said that "when a statute says money shall be levied by "distress this is an execution." Similarly in *Reg.* v. *Hedges* (2), on an appeal to quarter sessions from an allowance of overseers accounts, the sessions, it was said, "must execute their "judgment in the same manner as the two justices must do." More accurate language was used in the much argued case of *Hutchins* v. *Chambers* (3), where the question was whether averia carucae could be taken for distress upon the poor rate where there are other available goods sufficient. "As to this," said Lord Mansfield in the course of his judgment, "the solid "distinction is 'that the seizing under the 43 of Elizabeth and "'such like Acts of Parliament is but partly analogous to the "'common law distress (as being replevisable, etc.) but is "'much more analogous to the common execution' (like a fieri "facias, where the surplus after sale shall be returned)." He observed that where the things seized were merely held in pledge, as in the old common law distresses, it would be absurd to have suffered the implements by which a man gained his living to be holden as a pledge, because that would have been taking the only means he had of paying his debt. "But," he went on to say "this reason does not hold where the things "distrained may immediately be sold by way of satisfaction; "which, though called a distress, yet really is in this respect "an execution." A little lower down he quotes from Holt C.J. in *Vinkensterne* v. *Ebden* (4) to the effect that the common law exemption from distresses for rent arrear and other like cases does not extend to cases where a distress is given in the nature of an execution by any particular statute (as for poor rates, etc.) "Therefore," Lord Mansfield concludes, "it is "more analogous to an execution than to a distress at common

(1) 12 Mod. 328.

(2) 2 Salk. 533.

(3) 1 Burr. 579, 588.

(4) (1696) 1 Ld. Raymond 384, 386.

"law; and there, in case of execution, averia carucae may be "distrained, though there is other sufficient distress."

I have quoted these passages from Lord Mansfield because though later than the Act 2 W. and M. c. 5, which gave a right of sale in the case of distresses for rent, they distinguish that class of distresses from the statutory distresses, such as for poor rate, small tithes and many others, because of the fact that by the latter the goods distrained were seized in order to be sold to satisfy the debt. But Lord Mansfield did not describe that process as an execution; he said it was analogous to an execution or was in the particular respect an execution, or was in the nature of an execution. He is clearly distinguishing the statutory distress from an execution. Goddard L.J. fastens on these and similar passages as meaning that the two things, these cases of distress and cases of execution, can be treated as the same for purposes of this case. He is correct so far as a sharp distinction can be drawn between distress for rent or for damage feasant (to which the statute of William and Mary did not apply) and the statutory or other forms of distress which were analogous to executions in the proper sense. But in my opinion, he is not right in concluding per saltum that s. 1 of the Act of 8 Anne must therefore apply to distress for rates. Whether that is so or not must depend on the words of the statute, which I must now examine. Sect. 1 prescribes that no goods on any premises subject to a lease shall be liable to be taken by virtue of any execution on any pretence whatsoever unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the premises by virtue of such execution or extent, pay to the landlord or his bailiff arrears of rent to an amount not exceeding one year's rent. If the arrears exceed one year's rent "the party at whose suit such "execution is sued out may proceed to execute his judgment," and the sheriff is empowered and required "to levy and pay "to the plaintiff as well the money so paid for rent as the "execution money." I have found the curious and almost casual inclusion of the word "extent" difficult and shall discuss it later, but in any case I do not regard it as affecting the general scope of the section. The section deals with an execution sued out at the suit of a party to an action, an execution under which that party executes his judgment, he being the plaintiff. The fruit of the execution is execution money. In my opinion all these terms are appropriate to an action in a court in which there is a plaintiff (which, as *Henchett* v. *Kimpson* (1), shows, may include a defendant enforcing a right to costs on a non-suit): there is a judgment in the action: upon that judgment the plaintiff being the party in the action, sues out execution, that is a writ of execution upon the judgment. The execution of the writ is entrusted to the sheriff or other officer. They are all equally inappropriate to a distress warrant issued by justices for arrears of poor rate. The rating authority is not a plaintiff, but a complainant; he makes a complaint. The word plaintiff is, so far as I can find, never used in connection with these proceedings and could never be properly so used. There is no judgment, no issue of an execution upon a judgment at the suit of any plaintiff, there is no execution money, there is no writ to a sheriff or other officer, which I think means to a sheriff or some officer acting for him. What happens is that the justices having as a datum the rate which they must assume to have been duly made, and having summoned and judicially considered the case of the alleged defaulter, order a distress by means of a distress warrant in the statutory form addressed to the rating authority and to the constables or other peace officers of the borough. I find it impossible to bring such a distress warrant within the narrow and precise language of the statute. These statutory distresses ordered by justices and other inferior courts were well known at the date of the statute, the nature and form of a distress warrant in these cases were familiar, so were the procedure and process in essential particulars, as the language of Holt C.J. shows. It is true that there is no decision that the statute did not apply to orders for distress made by justices. But that is due to the fact that it was never claimed that the statute did apply. There are, however, reported decisions which deny the application of the section to particular proceedings which in many respects resemble executions of the ordinary type. The fullest discussion I have found is in *Brandling* v. *Barrington* (1). The defendant there was the sheriff of the County Palatine of Durham. He had seized certain goods under a writ of pone per vadios issued at the suit of the plaintiff in the action by the Court of Chancery of the County Palatine. The object of the writ was in effect to compel a defendant to appear. If the defendant did not appear the goods of the defendant were forfeited to the bishop and were seized and sold by the bailiff who had made the seizure. Out of the proceeds the plaintiff's claim was satisfied. The landlord brought an action against the bailiff for not paying him the half-year's rent then due. It was held that the statute of Anne did not apply and the landlord was non-suited. Now that was indeed a case of mesne process and there was no final order of any court. But it was in fact a process by which the plaintiff's claim was satisfied, though in form what happened was that the goods seized were forfeited to the bishop and by him assigned to the plaintiff so far as necessary to satisfy the claim for which the action was brought. The judges of the King's Bench were all of opinion that though the case fell within the "equity" of the statute it did not fall within its words. Lord Tenterden C.J. said (2): "The statute speaks "only of goods taken in virtue of any execution and the "plain sense of the words is confined to executions on judg-"ments." Bayley J. said (3): "I think we should be "attributing too comprehensive a meaning to the words of "this statute, if we held that it entitled the present plaintiff "to payment of the rent due to him. The goods of the tenant "were not taken in execution, although that which has been "done may have the effect of an execution. The writ of pone "is similar to the distringas issued out of this Court for the "purpose of compelling an appearance. Under the latter the "sheriff may, by order of the Court, sell the goods seized and "deliver over the proceeds to the plaintiff without paying to

---

(1) 2 Wils. K. B. 140.

---

(1) 6 B. & C. 467.
(2) Ibid. 475.
(3) Ibid. 477.

"the landlord a year's rent." In *Lee* v. *Lopes* (1), an attempt had been made but had failed to extend the scope of the statute to a commission in bankruptcy. Lord Ellenborough C.J. said that a commission of a bankrupt had been sometimes called a statutable execution, but though it might be said to be similitudinary to an execution, it was not an execution. No greater success attended attempts to extend the scope of the statute to a sequestration, as appears from *Dixon* v. *Smith* (2), which is explained by Lord Tenterden C.J. in *Brandling* v. *Barrington* (3) as a payment made out of the proceeds of the sequestration by the court into which the proceeds had been paid. It was clearly not under the statute of Anne as the arrears of rent so paid were for two years. The case of outlawry, *Greaves* v. *D'Acastro* (4) is likewise explained by Lord Tenterden as a proceeding by application to the favour of the Court of Exchequer. This view seems to be supported by *Rex* v. *Southerby and Etchins* (5), where the landlord was not relieved.

These authorities are not indeed directly relevant to the exact position in respect of a distress warrant for arrears of rates issued by justices, but they do I think support the conclusion that the statute of Anne is to be construed according to its terms, that execution is to be construed as meaning an execution in the ordinary sense, namely, under a judgment of a court, and that the word " plaintiff " is also to be construed as meaning a party to an action in which he claims relief. The proceeding by way of a complaint for a distress warrant is a special and peculiar proceeding, not indeed limited to the poor rate, since it also applies to various other rates, for instance charges under local statutes and to others like the small tithes. Mr. Denning in his able argument drew your Lordships' attention to many instances of this nature. As regards poor rates at least it has been held that there is no debt which can be claimed in a court of law or ordinary process. This was the decision of the Court of Appeal in

---

(1) (1812) 15 East 230.
(2) (1818) 1 Swanst. 457.
(3) 6 B. & C. 467, 475.
(4) (1725) Bunb. 194.
(5) (1716) Bunb. 5.

Liverpool Corporation v. *Hope* (1). I agree with that decision, which again emphasizes the difficulty of applying the ordinary language appropriate to enforcing a common law liability to a liability which is the creature of statute such as that in question.

In 1709 such terms as execution, plaintiff, party, judgment, were well defined and understood. The question under the Act of Anne must be how these are to be applied to any particular procedure, and in particular for purposes of this appeal to the process involved in a justices' warrant of distress for rates. When the modern county courts were established, their procedure was in many respects, including execution, assimilated to that of the superior courts. Sect. 160 of the County Courts Act, 1888, provided that s. 1 of the Act of 1709 should not apply to an execution of a county court, but then in effect it went on to apply it subject to modifications as to amount of arrears of rent claimable by the landlord. It is thus not necessary to consider whether the Act of 1709 would, apart from express words, have applied to this new type of execution.

I cannot, with the greatest respect, find any justification for giving the landlord the priority which he is claiming here over a rating authority, which cannot in any ordinary sense of the term be described as an execution creditor.

The introduction of the word "extent" in the section is very odd and is certainly difficult to explain. The section could not in my opinion be applied to statutes merchant or statutes staple or the like, in which there is clearly no judgment and none of the ordinary features of a legal proceeding. The draftsman of the Act may have thought that extents in aid might be considered to be sufficiently near to an execution issued at the suit of a private person and thus to come within the protection of the section. It was indeed held in *Rex* v. *De Caux* (2) in 1815, that an extent in aid, though issued in aid of a subject, was a prerogative process and ultimately and in effect operating for the benefit of the Crown and that therefore under s. 8 s. 1 could not be construed so as to operate

(1) [1938] 1 K. B. 751.

(2) 2 Price 17.

to the prejudice of the Crown. The court referred to *Rex* v. *Cotton* (1), where in 1751 there was an elaborate discussion of the point, and went on to say that the word "extent" might be satisfied by applying it to such as were of a private nature, as extents on statute staple and others. As I have already indicated, I do not feel able to reconcile this with the words of s. 1. But however that may be, I do not regard the somewhat casual insertion of the word "extent" as sufficient to change the whole substance of the section.

For all these reasons I would allow the appeal.

LORD ROMER. My Lords, Lord Justice Goddard in the judgment that he delivered on behalf of the Court of Appeal in this case has given reasons which to my mind are conclusive for thinking that a distress for rates may be properly described as an execution. Sir Edmund Saunders, in his Observations upon the statute of 22 Car. II., c. 1, published in the year 1685, had come to the same conclusion. By s. 2 of that Act, which had been passed for the purpose of preventing and suppressing seditious conventicles, it had been enacted that on conviction by the justices an offender against the provisions of the Act should for every such offence incur the penalty of ten shillings and that the same should be levied by distress and sale of the goods and chattels of the offender. In commenting upon this section the learned author said this: "Goods and chattels; "this reaches to the utensils, tools and instruments of trade, "as well as any other goods and chattels; for the rule of the "common law that exempts such (where there is sufficient "besides) from distress extends not where distress is given as "an execution by any particular statute, as for poor rates, "hearth money, and so the like on this law, and governs only "in distress for rents, amerciaments, and the like." In the year 1699 Holt C.J. in the case of *Rex* v. *Speed* (2) expressed a similar view. He said this: "When a statute says money "'shall be levied by distress' that is an execution." But though I am of opinion that the word "execution" was in the year 1709 and still is in general wide enough to include a distress

---

(1) (1751) Parker 112.

(2) 12 Mod. 328.

H. L. (E.)
1940
POTTS
v.
HICKMAN.
Lord Romer.

for rates I find it impossible to think that it is used in such a wide sense in s. 1 of the Landlord and Tenant Act of that year. The question whether or not it is so used is one to be determined by applying to the section the well-settled principles of construction. Not the least important of these principles when applied to the section is that which requires that, for the purpose of ascertaining the sense in which the word "execution" is used, the section must be read as a whole. So reading it, I find that every execution to which it applies is treated as possessing the following characteristics: (1.) it must have been sued out at the suit of "a party"; (2.) it must be an execution of "a judgment" in favour of that party; (3.) the party at whose suit it is sued out must be one who can aptly be described as "a plaintiff."

My Lords, in my opinion, a distress for rates cannot, without a straining of language for which I can find no justification, be said to possess any one of these characteristics. It is not sued out at the suit of "a party"; there is no "judgment" in favour of "a party"; and, although a defendant in whose favour a judgment has been pronounced in an action, must for this purpose be treated as being a "plaintiff" within the meaning of the section, I fail to see how a rating authority by applying for and obtaining a warrant of distress for unpaid rates can be properly so described. I am therefore of opinion that s. 1 of the Act of 1709 does not upon its true construction apply to a distress for rates. In arriving at this conclusion I derive some satisfaction from the thought that, in spite of the numerous occasions on which during the last 230 years it must have been to the interest of the landlord of a defaulting ratepayer to suggest the contrary view of the meaning of the Act, no one of them until the present case would appear to have done so. I also find some satisfaction in the fact that the legislature itself appears to have taken the same view as that which I have expressed. The Distress for Rates Act, 1849, prescribes the form to be used by justices when issuing a warrant for distress for non-payment of rates, and the warrant in the present case follows the form so prescribed. It is addressed to the rating authority and commands them in

His Majesty's name to make distress of the goods and chattels of the defaulters whose names together with the amounts due from them respectively are set forth in a schedule to the warrant. It continues as follows "and if within the space "of five clear days after the making of such distresses respectively the several sums set opposite to the respective "names . . . together with the reasonable charges of taking "and keeping the said distress in each case shall not be paid, "that then you do sell the said goods and chattels of the "person so making default, and out of the money arising by "such sales respectively, you retain the sums so set opposite "to the name of each person whose goods and chattels you "shall have so sold, together with the reasonable costs and "charges attending such distress and sale, rendering to such "person the overplus (if any)." It will be observed that no provision whatever is made by the warrant for refunding to the rating authority any sums paid by them to the landlords of the defaulting ratepayer in respect of arrears of rent as it would have done had it been thought by the legislature that s. 1 of the Act of 1709 applied to a distress for rates. The appellant, as the agent of the rating authority, the Wolverhampton Corporation, applied the net proceeds of the goods and chattels of the respondent's tenant in discharging, so far as such proceeds would permit, the rates due from the tenant without making any provision for the arrears of rent due to the respondent. In so doing he was merely acting in the way in which the justices had in His Majesty's name commanded him to do. It is a curious aspect of the case that the respondent now seeks to make the appellant responsible in damages for having so acted.

My Lords, for the reasons I have given I agree that this appeal should be allowed, and I concur in the motion now before the House.

Appeal allowed.

Solicitors for appellant: *Sharpe, Pritchard & Co. for J. Brock Allon, Town Clerk, Wolverhampton.*

Solicitors for respondent: *Simon, Haynes, Barlas & Ireland, agents for Feibusch & Wells, Wolverhampton.*

[HOUSE OF LORDS.]

G. SCAMMELL AND NEPHEW, LIMITED APPELLANTS ;

AND

H. C. AND J. G. OUSTON . . . . . RESPONDENTS.

H. L. (E.)*

1940

Oct. 17, 18, 22 ;
Dec. 16.

Sale of goods—Stipulation that part of price to be "on hire purchase "terms"—Term too vague to constitute a concluded contract.

The respondents agreed to purchase from the appellants a new motor van but stipulated that "this order is given on the "understanding that the balance of purchase price can be had "on hire-purchase terms over a period of two years":—

Held, that this clause as to hire-purchase terms was so vague that no precise meaning could be attributed to it, and consequently there was no enforceable contract between the parties.

Decision of the Court of Appeal reversed.

Appeal from a decision of the Court of Appeal dismissing an appeal from Tucker J.

In November, 1937, the respondents, H. C. and J. G. Ouston, were desirous of acquiring a new motor-van on hire-purchase terms, giving in part payment a Bedford motor-van which they then had. At an interview on November 23, 1937, between Mr. Cook, a representative of the appellants, and Mr. J. G. Ouston, on behalf of the respondents, Mr. Ouston mentioned that the respondents would require the new vehicle "on hire-purchase." A new vehicle having been provisionally selected by the respondents, the appellants wrote a few days later, giving a quotation of 268*l.*, and stating that they were prepared to allow 100*l.* for the Bedford van. At a later interview Mr. H. C. Ouston stated that the respondents intended to have one of the appellants' vans on the understanding that the appellants allowed the respondents 100*l.* for the old van. Following this interview the appellants wrote, expressing thanks for the order. The respondents replied to the last-mentioned letter in the following terms: "We beg to acknowledge receipt of your acceptance of our

---

* *Present:* Viscount Simon L.C., Viscount Maugham, Lord Russell of Killowen, and Lord Wright.

H. L. (E.)
1940
SCAMMELL (G.) AND NEPHEW, LD.
v.
OUSTON (H. C. AND J. G.).

"order for :—One Commer 15-cwt. chassis, complete with "body. . . . This order is given on the understanding that "the balance of purchase price can be had on hire-purchase "terms over a period of two years." Later, the appellants wrote to the respondents as follows: "Further to our conversation, we have now received advice from the United "Dominions Trust Co., Ld., of their acceptance of the hire-purchase in connection with the vehicle we are supplying, "and we will, in due course, forward the documents to you."

Before any hire-purchase agreement was entered into or any agreement reached as to the provisions it should contain the appellants refused to proceed further, whereupon the respondents brought an action claiming damages for breach of contract to "supply" the vehicle. To that the appellants pleaded that until a hire-purchase agreement was effected neither party was bound and that the alleged agreement was void for uncertainty.

Tucker J., who tried the action, held that the respondents were absolved from performance by the wrongful repudiation of the contract, which he found to have been constituted in spite of the general nature of the reference to hire-purchase, and he accordingly awarded damages. From that judgment Scammell & Nephew, Ld., appealed to the Court of Appeal, but that court dismissed the appeal. Slesser L.J. considered that the agreement meant that what is commonly understood by business men to be one of the methods of hire-purchase should be the method of discharging the payment for the car. To read it otherwise would be to nullify the intention of the parties who, in his opinion, quite clearly intended such an agreement. MacKinnon L.J. thought the contract was a perfectly simple and ordinary business agreement, the essential stipulation implied being that it should be in a reasonable form. Goddard L.J. also agreed, adding that it was a matter for the choice of the defendants how the hire-purchase term of the alleged contract was to be carried out.

The defendants appealed to this House.

A. T. Miller K.C. and *Constantine Gallop* for the appellants.

H. L. (E.)
1940
SCAMMELL (G.) AND NEPHEW, LD.
v.
OUSTON (H. C. AND J. G.).

The question is whether there was between the parties a concluded contract, and in particular whether the expression "on hire-purchase terms" can be said to have a defined legal signification. We submit that it has not, being too vague, and on that account cannot be enforced.

G. H. Beyfus K.C. and *W. A. L. Raeburn* for the respondents. In considering whether there was a concluded contract there is one matter to which the House can look, namely, whether the parties themselves thought that they had arrived at that result. Applying that test we say that there was a concluded contract. There was clearly a contractual intention on both sides by which Scammells agreed to make the car available for the respondents on the terms stated, the latter agreeing to take delivery. The parties were thus ad idem.

The House took time for consideration.

1940. Dec. 16. VISCOUNT SIMON L.C. My Lords, during much of the argument I remained unconvinced that the result reached in the courts below (various as is the reasoning by which the different judges reached that result) could not be sustained by taking the view that this was a contract for the sale and purchase of a motor-car, subject to the condition that the contract ceased to be binding if the finance for the purchase could not be provided for the respondents within a reasonable time, and in a reasonable manner, by the method of hire-purchase through a third party. If this view of the bargain were justified, then the appellants wrongfully repudiated their prospective obligations out and out, without waiting to see whether the condition was or was not complied with; in that situation the respondents could sue for damages for anticipatory breach without the necessity of the condition being fulfilled; *Frost* v. *Knight* (1), where the engagement to marry was conditional on the defendant's father first dying, and where the repudiation of the promise occurred in the father's lifetime, is a familiar example of the principle which I should have been glad to apply.

---

(1) (1872) L. R. 7 Ex. 111.

But, on further reflection, and in the light of the opinions prepared by some of your Lordships which I have had the advantage of reading, I do not think this view is tenable. Apart from the objection that if the contract is treated as a contract of sale in the terms suggested above, there is no signature by the appellants, as the party to be charged, accepting the condition, it appears to me that the crucial sentence "This order is given on the understanding that the balance "of purchase price can be had on hire-purchase terms over a "period of two years" is so vaguely expressed that it cannot, standing by itself, be given a definite meaning—that is to say, it requires further agreement to be reached between the parties before there would be a complete consensus ad idem. If so, there was no contract and therefore no breach.

I move that the appeal be allowed with costs here and below.

VISCOUNT MAUGHAM. My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Russell of Killowen. I entirely agree with it and with his statement of the relevant facts. No less, however, than four judges have come to a different conclusion, and they think that the respondents have succeeded in establishing a contract in this case. I should always be slow to differ from views of those for whom I entertain a very genuine respect, if I could entertain any real doubt about the matter. I am constrained therefore to add some remarks of my own to explain why I am led to an opinion which coincides with that of my noble friend.

It is a regrettable fact that there are few, if any, topics on which there seems to be a greater difference of judicial opinion than those which relate to the question whether as the result of informal letters or like documents a binding contract has been arrived at. Many well known instances are to be found in the books, the last being that of *Hillas & Co.* v. *Arcos, Ld.* (1). The reason for these different conclusions is that laymen unassisted by persons with a legal training are not always

---

(1) (1932) 147 L. T. 503.

H. L. (E.)
1940
SCAMMELL (G.) AND NEPHEW, LD.
v.
OUSTON (H. C. AND J. G.).
Viscount Maugham.

accustomed to use words or phrases with a precise or definite meaning. In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words the consensus ad idem would be a matter of mere conjecture. This general rule, however, applies somewhat differently in different cases. In commercial documents connected with dealings in a trade with which the parties are perfectly familiar the court is very willing, if satisfied that the parties thought that they made a binding contract, to imply terms and in particular terms as to the method of carrying out the contract which it would be impossible to supply in other kinds of contract: see *Hillas & Co.* v. *Arcos, Ld.* (1).

My Lords, it is beyond dispute that if an alleged contract is partly oral and partly in writing it is necessary to take the whole of the negotiations into consideration for the purpose of seeing whether the parties are truly agreed on all material points, for if they are not there is no binding contract. Nor is it right to construe a letter or other document forming a part of the negotiations in such a case without regard to the oral statements which also form a part of them. To construe the language of such letter, so to speak, in vacuo might easily result in giving to the words of it a meaning which as used by the writer, in the circumstances of the case, he did not intend the words to bear or one which the recipient of the letter did not attribute to them. Accordingly, the words in the letter, "This order is given on the understanding that the balance "of purchase price can be had on hire-purchase terms over a "period of two years," must be read together with the parol evidence of Mr. J. G. Ouston in order to give those words their true meaning. So read, I cannot myself doubt, they are not an attempt to impose a new condition, whether precedent or subsequent, but are merely a reminder of the common intention of the parties from the start, though perhaps—and even of that I am not certain—the reference to the period of two years was something which had not previously been agreed.

---

(1) 147 L. T. 503, 511, 512, 514.

We come then to the question as to the effect of the (so-called) purchase being on "hire-purchase terms," and here we are confronted with a strange and confusing circumstance. The term "hire-purchase" for a good many years past has been understood to mean a contract of hire by the owner of a chattel conferring on the hirer an option to purchase on the performance of certain conditions: *Helby* v. *Matthews* (1). There is in these contracts—and this is from a business standpoint a most important matter—no agreement to buy within the Factors Act, 1889, or the Sale of Goods Act, 1893; there is only an option and the hirer can confer on a purchaser from him no better title than he himself has, except in the case of sale in market overt. It is inaccurate and misleading to add to an order for goods, as if given by a purchaser, a clause that hire-purchase terms are to apply, without something to explain the apparent contradiction. Moreover a hire-purchase agreement may assume many forms and some of the variations in those forms are of the most important character, e.g., those which relate to termination of the agreement, warranty of fitness, duties as to repair, interest, and so forth.

Bearing these facts in mind, what do the words as to "hire-"purchase terms" mean in the present case? They may indicate that the hire-purchase agreement was to be granted by the appellants or on the other hand by some finance company acting in collaboration with the appellants; they may contemplate that the appellants were to receive by instalments a sum of 168*l.* spread over a period of two years upon delivering the new van and receiving the old car, or, on the other hand, that the appellants were to receive from a third party a lump sum of 168*l.* and that the third party, presumably a finance company, was to receive from the respondents a larger sum than 168*l.* to include interest and profit spread over a period of two years. Moreover, nothing is said (except as to the two years period) as to the terms of the hire-purchase

(1) [1895] A. C. 471.

agreement, for instance, as to the interest payable, and as to the rights of the letter whoever he may be in the event of default by the respondents in payment of the instalments at the due dates. As regards the last matters there was no evidence to suggest that there are any well known "usual terms" in such a contract; and I think it is common knowledge that in fact many letters though by no means all of them insist on terms which the legislature regards as so unfair and unconscionable that it was recently found necessary to deal with the matter in the recent Act entitled the Hire-Purchase Act, 1938.

These, my Lords, are very serious difficulties, and when we find as we do in this curious case that the trial judge and the three Lords Justices, and even the two counsel who addressed your Lordships for the respondents, were unable to agree upon the true construction of the alleged agreement, it seems to me that it is impossible to conclude that a binding agreement has been established by the respondents. I need not state the different views entertained by the trial judge, and the Lords Justices, and by counsel, for that will be done by my noble friend Lord Russell.

The appeal must, I think, succeed, and the action for damages must be dismissed with costs here and below.

LORD RUSSELL OF KILLOWEN. My Lords, in my opinion this appeal should be allowed. The action is brought to recover damages for breach of a contract alleged to have been made at certain interviews and by certain letters between the parties and their representatives. In the forefront of their defence the appellants pleaded that no agreement arose out of those letters or interviews. That defence, if established, is a complete answer to the action; and I feel no doubt that it has been established.

Although the argument before this House took place on four separate days, the point which ultimately emerges is short, and depends upon the question whether any, and what, certain meaning can be attributed to one sentence in a letter from the respondents to the appellants: a question in the solution of which I get no help from any of the authorities which were cited during the debate.

The relevant facts can be briefly stated. The respondents wished to acquire a new motor van, giving in part exchange a Bedford van which they owned. On November 23, 1937, an interview took place between a partner in the respondents' firm, one John Ouston, and a Mr. Cook, who represented the appellants, at which Mr. Cook recommended a Commer 15-cwt. van as suitable for the respondents' requirements, and suggested 80*l*. as the figure at which the Bedford van should be taken in part exchange, a figure, however, which Mr. Ouston considered too low. On the following day the appellants (by Mr. Cook) wrote to the respondents a letter giving a quotation for the proposed Commer van at 268*l*., and stating that they were prepared to allow the sum of 100*l*. for the Bedford van. On December 6, 1937, an interview took place at which John Ouston, his father and co-partner Harry Ouston, and Mr. Cook were present. At that interview the offer contained in the letter of November 24, 1937, was accepted by the respondents. On December 7, 1937, the appellants (by Mr. Cook) wrote to Mr. Ouston thanking him for the order placed with Mr. Cook, on the previous evening, and asking him to let them have the official order in order to complete their records. This request was complied with by a letter from Mr. Harry Ouston dated December 8, 1937, in the following terms: "We beg to acknowledge receipt of your acceptance of our order for: One "Commer 15-cwt. chassis complete with body as per your "specification sent us on 25th November, Number 5263. This "order is given on the understanding that the balance of "purchase price can be had on hire-purchase terms over a "period of two years."

It is upon the true meaning and effect of this last sentence that this case depends. But before considering its meaning and effect, a further relevant fact must be added, namely, that throughout the negotiation between the parties it was made clear that the respondents wanted to purchase on hire-purchase terms, and that there was never any question of an out-and-out purchase by the respondents. Two questions and answers in Mr. John Ouston's evidence establish this beyond doubt: "Q. Anyway, this is quite clear; that from the "beginning of your discussions with Mr. Cook, you always "told him quite definitely that you wanted to purchase on "hire purchase terms? A. That is quite clear. Q. There "was no question of an out-and-out purchase? A. No, there "never was." In these circumstances the true construction of the agreement alleged by the statement of claim to arise out of the letters of December 7 and 8, 1937, and the interview of December 6, 1937, is a matter open to endless doubt and speculation. At least five different versions have been presented for your Lordships' consideration.

The trial judge was of opinion that there existed a contract for the sale by the appellants to the respondents of a Commer van for the sum of 268*l.*, to be paid and satisfied as to 168*l.* in cash and as to the balance by the delivery to the appellants of the Bedford van; that the concluding sentence of the letter of December 8, 1937, "was merely a condition precedent "to the contract becoming an effective contract"; and that "as in his opinion the appellants repudiated the contract on "wrong grounds, they cannot rely upon the necessity for "the respondents showing that that condition has been "fulfilled."

The Court of Appeal took a different view. The Lords Justices all treated the sentence in question as a term of the contract between the parties, and not as a condition precedent to that contract; but they differed (inter se) as to the construction of that contract.

Slesser L.J. thought that the alleged contract might be carried out in any one of several specified ways but that it lay on the respondents within a reasonable time, in a reasonable way, to produce some method whereby they could under the conditions of a hire-purchase agreement satisfy their undertaking by one way or another through a hire-purchase agreement to pay the appellants. Notwithstanding this lack of certainty the Lord Justice considered that a complete agreement had been concluded, on the ground that—as he put it—"You may very well agree that a certain part of the "contract, such as the particular conditions on which the hire-"purchase agreement was to be made, was to be settled in "conjunction with a third party."

MacKinnon L.J. took the view that by the alleged contract the appellants undertook to procure a finance company to purchase the van from them, and to hand over its possession to the respondents under the terms of a hire-purchase agreement pursuant to which the respondents would ultimately pay to the finance company 268*l*., reduced to 168*l*. by the 100*l*. for the Bedford van, which sum would be paid to the finance company by the appellants.

Goddard L.J. was of opinion that the alleged contract was a contract by the appellants to put the respondents in possession of the Commer van for a sum of 268*l*., 100*l*. of which was to be satisfied by the delivery of the Bedford van and 168*l*. of which was to be satisfied by instalments over two years, being 24 monthly instalments, and that it was matter for the choice of the appellants how the hire-purchase term of the alleged contract was to be carried out.

At your Lordships' bar leading counsel for the respondents (agreeing in substance with the trial judge) argued that there was a simple contract of sale and purchase subject only to the condition precedent, that the balance of the purchase price could be had on reasonable hire-purchase terms. On the other hand junior counsel contended for a contract which was not a contract of sale and purchase at all, but a contract the obligations under which he stated in elaborate detail, the whole being subject to a condition subsequent defined in negative form by reference to the concluding sentence of the letter of December 8, 1937.

The existence of this fivefold choice is embarrassing but eloquent. An alleged contract which appeals for its meaning to so many skilled minds in so many different ways, is undoubtedly open to suspicion. For myself I feel no doubt that no contract between the parties existed at all; notwithstanding that they may have thought otherwise.

The oral evidence establishes that the only acquisition by the respondents which was contemplated by the parties, was an

H. L. (E.)
1940

Scammell (G.) and Nephew, Ld. v. Ouston (H. C. and J. G.).

Lord Russell of Killowen.

acquisition by some form of hire-purchase, which would enable the respondents to spread their payment of 168*l.* over a period of time. This could be brought about in various ways, and by documents containing a multiplicity of different terms. In my opinion the concluding sentence of the letter of December 8, 1937, was not a condition precedent to any contract. It is merely a recording in writing of what had been the common intention of the parties in their discussions and negotiations, with a stipulation, apparently for the first time, for a period of two years. But, in view of the numerous forms of hire-purchase transactions, and the multiplicity of terms and details which they involve, the respondents are faced with what appears to me to be a fatal alternative, namely, either (1.) this term of the alleged contract is quite uncertain as to its meaning, and prevents the existence of an enforceable contract, or (2.) the term leaves essential contractual provisions for further negotiation between the parties, with the same result.

Accordingly, in my opinion the action for damages for breach of an alleged contract should have been dismissed, and this appeal should succeed.

Lord Wright. My Lords, the decision of this appeal depends on the answer to the question whether there was a concluded contract between the appellants and respondents. The respondents were plaintiffs in the action and claimed damages from the appellants for breach of contract. The appellants, who had raised other objections, limited their defence in this House to the one issue, "contract or no "contract." Tucker J., the trial judge, and the Lords Justices in the Court of Appeal have decided against the appellants, but for reasons which present an embarrassing diversity.

In November, 1937, the respondents were desirous of acquiring a new motor-van for their business of house furnishers. As a result of interviews between their partners and Mr. Cook, general sales manager of the appellants, the appellants on November 24, 1937, sent to the respondents a quotation of 268*l.* for a Commer 15-cwt. chassis complete as per manufacturer's specification fitted with special Scammell body constructed in the appellants' shops. Against the 268*l.* they were prepared to allow the respondents 100*l.* for their 1935 2-ton Bedford Luton van. A specification of the body was enclosed. At a conversation between Mr. Cook and Mr. H. C. Ouston, the latter placed the order with the appellants. This was confirmed by letter of December 7, 1937, which stated that the appellants could deliver the van before February, 1938, and asked to have the respondents' official order. On December 8, 1937, the respondents replied in the following terms: "We beg to acknowledge receipt of your "acceptance of our order for one Commer 15-cwt. chassis "complete with body as per your specification sent us on "November 25, Number 5263. This order is given on the "understanding that the balance of purchase price can be had "on hire purchase terms over a period of two years."

At the oral conversations the respondents had clearly insisted that a hire-purchase agreement was essential. No terms, however, of such an agreement had been settled, nor indeed had it been discussed with whom the agreement would be made. Mr. H. C. Ouston, when asked in cross-examination "The hire-purchase agreement, of course, you did not expect, "I suppose, to be with Messrs. Scammells, did you?" replied, "I knew very well it would not have been. To the best of "my knowledge, anyhow, I thought it would be, as it turned "out to be, with United Dominions." Mr. J. G. Ouston said in evidence that he always told Mr. Cook quite definitely that they wanted to purchase on hire-purchase terms and that there never was any question of an out-and-out purchase. The appellants were obviously content that the deal should be on a hire-purchase basis, and proceeded with the completion of the van. On January 27, 1938, they wrote to the respondents that they had received advice from the United Dominions Trust Co., Ld., of their acceptance of hire-purchase in connection with the vehicle and would forward the documents in due course. On February 10, 1938, they reported that the van would be ready for collection in a few days, "subject to mutual acceptance of the hire-purchase agreement." They added, " We make it a condition of the supply of vehicles "on hire-purchase terms that we approve terms of agreement "before supply." The next development was an inspection of the Bedford van by the appellants, which resulted in an unfavourable report on its condition and also a report that it was a 1934 vehicle and not a 1935 vehicle. The appellants then wrote on February 14, 1938, that as the vehicle did not fulfil the contract conditions the respondents had better dispose of it locally. They added, "We assume that the hire-"purchase company will require a minimum of 25 per cent. "deposit, which would call for 67*l*." The respondents' solicitors wrote denying that the complaints alleged against the van were justified and in their turn charged the appellants with default in not delivering the Commer van in time. They also threatened proceedings. The appellants replied reiterating their objections and added that if the respondents would deliver a 1935 Bedford van in approved condition they would accept it. Otherwise they asked that the respondents would complete the transaction, take delivery of the new machine, and pay the sum of 268*l*. for it. They added that hire-purchase terms could no doubt be arranged to suit the convenience of the respondents, but that, of course, did not affect the business. On February 26, 1938, the appellants wrote to the respondents in the following terms: "In order to assist you in placing with the hire-purchase company your new Commer lorry which we "have ready to your order, we are attaching hereto a list "showing the complete cost of this vehicle." This, with extras, came to 298*l*. 6*s*. 2*d*. The correspondence proceeded until on May 18, 1938, the respondents issued their writ against the appellants claiming damages for breach of contract to supply a Commer 15-cwt. chassis complete with body and accept a 2-ton Bedford Luton van in part exchange therefor. This was repeated in the statement of claim which added that the price was 268*l*. The defence denied that there was any contract, by para. 2 pleaded that by the express terms of the letter of December 8, 1937, the alleged agreement was subject to a condition as to hire-purchase terms as therein set out and claimed that "Accordingly unless and until a hire-purchase "agreement in terms mutually approved by the plaintiffs and "the defendants was effected neither party was bound. No "such hire-purchase agreement was ever effected." It was also pleaded that the said condition was too vague to be capable of any effect in law, and that therefore the agreement was void for uncertainty. The defence further relied on s. 4 of the Sale of Goods Act, 1893, and set up that the complaint in regard to the condition and age of the Bedford van constituted breaches of condition excusing the appellants from performance. These latter defences were abandoned before the learned judge and need not be further considered. There was also a counterclaim not now material.

At the trial Tucker J. found that the appellants' letter of February 14, 1938, was a complete repudiation of any contract, and awarded damages in favour of the respondents against the appellants for breach of contract, having decided against their contention that there was no contract. He said that Mr. Beyfus had argued on behalf of the respondents that the contract was that the respondents should provide 168*l.* for the balance of the price, and that it was immaterial to the appellants where the respondents got the money from and what arrangements they made with the finance company. He further stated that Mr. Beyfus had also argued that the stipulation as to hire-purchase was merely a condition precedent to the contract becoming an effective contract. The learned judge held that Mr. Beyfus was right in his argument, by which I think he meant the second of these arguments, and held that the appellants by wrongly repudiating the contract had relieved the respondents from showing that the condition precedent had taken effect or that the purchase price on hire-purchase terms over a period of years had, in fact, been obtained or could have been obtained. He held that s. 4 of the Sale of Goods Act had been complied with.

In the Court of Appeal Slesser L.J. affirmed the judgment. The ground on which he held that there was a concluded agreement was that though there were many methods of hire-purchase finance that might be adopted, what was meant was in his opinion that the purchasers must in a reasonable time, in a reasonable way, satisfying the words "hire purchase "agreement," produce some method whereby they could satisfy their undertaking by one way or another through a hire-purchase agreement to pay the sellers. The particular conditions under which the hire-purchase agreement was to be made were, he said, to be settled in conjunction with a third party. Like Tucker J. he placed the obligation to procure the hire-purchase agreement on the respondents but held that the repudiation by the appellants relieved the respondents from showing fulfilment of the condition.

MacKinnon L.J. on the other hand placed the obligation as regards the hire-purchase agreement on the appellants. In his opinion the parties knew perfectly well the sort of agreement with the finance company that both contemplated. "It is "quite true," he said, "that the form of agreement might have "been in one or other of two or three forms. The essential "stipulation implied was that it should be in a reasonable "form. Either one of two variable forms, if in a reasonable "form, would have sufficed for the satisfaction of the defend-"ants' obligation." He held that it was not a contract for the sale of goods but a contract to procure the finance company to purchase for the appellants a car and let it on hire-purchase terms to the respondents. He found among the papers the draft of an agreement that he regarded as carrying out the transaction. It was, however, not of that type at all. The appellants were, according to that draft, to be the letters and the respondents the hirers. The United Dominions Trust Co., Ld., were to finance the transaction by discounting 24 promissory notes made by the respondents payable to the appellants and by them to be endorsed to the Trust Company for a total sum of 194*l.*, representing the balance of the purchase price of 168*l.*, with bank charges added. The draft hiring agreement itself contained eleven clauses, dealing with the hirers' obligation to repair, to insure, and giving the letters a right of retaking the van in the event of the hirers' default, and finally giving the hirer when all payments were discharged and terms fulfilled the option to purchase the van for one shilling. The draft agreement, to which the appellants, respondents and the Trust Company were to be parties, was

H. L. (E.)

1940

SCAMMELL (G.) AND NEPHEW, LD. *v.* OUSTON (H. C. AND J. G.).

Lord Wright.

never signed. It was not in evidence and, with great respect, I do not think that the Lord Justice was entitled to refer to it. But I have thought it necessary to look at it in order to understand the opinion of the Lord Justice. If such an agreement was necessary to complete the bargain involved in the letter of December 8, 1937, it clearly in my opinion could not have been arrived at until the parties had settled many doubtful points on which they might have differed, and as to which the court would not be able or entitled to say what was reasonable as between them.

Goddard L.J. seems to agree with MacKinnon L.J. that it was for the appellants to procure the agreement with the finance company but he agreed only in that respect. They were, it seems, in his opinion, to submit to the respondents a hire-purchase agreement which gave the respondents two years' credit for the 168*l*. "It seems to me," he said, "that it is a "matter of entire indifference to the plaintiffs whether or not "the defendants procured a finance company to buy direct "from them and let to the plaintiffs or whether the defendants "procured a finance company to discount bills given under a "contract by which the defendants themselves entered into "direct relations with the plaintiffs. Those are matters which "the defendants could choose for themselves. But the "plaintiffs would have to take the vehicle, and have to enter "into the agreement, provided an agreement was submitted "to them which gave them two years' credit for the 168*l*." As to matters like rate of interest and bank charges, terms of hiring and other essentials affecting the respondents' obligations and rights, the respondents, if I understand the view of the Lord Justice, would have no say at all.

To complete a statement of the variant readings submitted for your Lordships to choose the one which may seem to represent the true meaning of the parties, it is necessary very briefly to summarize the contentions of Mr. Beyfus and his junior, Mr. Raeburn, before this House. The former put his contentions in the alternative. First he argued that the phrase in the letter of December 8, 1937, meant that the bargain was subject to a condition precedent that a certain state of

H. L. (E.)
1940
SCAMMELL (G.) AND NEPHEW, LD.
v.
OUSTON (H. C. AND J. G.).
Lord Wright.

affairs for the benefit of the respondents should exist between the date of the contract and the date of delivery of the vehicle, namely, the availability of a fund on hire-purchase terms, and that the appellants having repudiated the contract, the respondents were absolved from proving that the condition had been fulfilled. He meant, I think, by the condition precedent a stipulation in the contract, not an extrinsic condition without the fulfilment of which there could be no contract. His alternative submission was based on the view that "can" was equivalent to "shall." On this alternative he read the term as meaning that the appellants were either personally to enter into a hire-purchase agreement or procure another person to enter into a hire-purchase agreement over a period of two years, containing reasonable terms having regard to the usual practice of hire-purchase finance. The personality of the hirer, he said, was left to the option of the appellants. He further submitted that if the courts could not give a defined meaning to the condition, they should disregard it. Mr. Raeburn argued that the agreement was defeasible if the respondents could not obtain suitable financial assistance on hire-purchase terms, subject, however, to this, that the appellants could compel the respondents to take delivery if they could show the availability of hire-purchase finance. Thus, he contended, the agreement was binding unless it was shown that reasonable businesslike hire-purchase facilities were not available. All that hire-purchase here meant, he contended, was a system under which the vehicle was hired with an option to purchase. Agreement between the parties as to terms was immaterial.

Such are the conflicting views which are placed before your Lordships as requiring a decision in favour of the respondents. But in my opinion the correct view is that put forward by Mr. Miller on behalf of the appellants, namely, that there never was a concluded contract between the parties. It is true that when the appellants broke off the affair they gave reasons for doing so which they could not justify. But when they were sued for breach of contract they were entitled to resist the claim on any good ground that was available, regardless of reasons which they had previously given. As Lord Sumner pointed out in *British & Benningtons, Ld.* v. *N. W. Cachar Tea Co.* (1), if a party repudiated a contract giving no reasons at all, all reasons and all defences in the action, partial or complete, would be open to him. Equally would this be so, I think, if he gave reasons which he could not substantiate. If there never was a contract, they could not be made liable for breach of contract. There are in my opinion two grounds on which the court ought to hold that there was never a contract. The first is that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention. The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found. But I think that it is found in this case. My reason for so thinking is not only based on the actual vagueness and unintelligibility of the words used, but is confirmed by the startling diversity of explanations, tendered by those who think there was a bargain, of what the bargain was. I do not think it would be right to hold the appellants to any particular version. It was all left too vague. There are many cases in the books of what are called illusory contracts, that is, where the parties may have thought they were making a contract but failed to arrive at a definite bargain. It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain. In my opinion that requirement was not satisfied in this case.

---

(1) [1923] A. C. 48, 71.

But I think the other reason, which is that the parties never in intention nor even in appearance reached an agreement, is a still sounder reason against enforcing the claim. In truth, in my opinion, their agreement was inchoate and never got beyond negotiations. They did, indeed, accept the position that there should be some form of hire-purchase agreement, but they never went on to complete their agreement by settling between them what the terms of the hire-purchase agreement were to be. The furthest point they reached was an understanding or agreement to agree upon hire-purchase terms. But as Lord Dunedin said in *May & Butcher* v. *The King* (1), reported in a note to *Foley* v. *Classique Coaches, Ld.* (2), "To be "a good contract there must be a concluded bargain and "a concluded contract is one which settles everything "that is necessary to be settled and leaves nothing to be "settled by agreement between the parties. Of course it "may leave something which has still to be determined but "then that determination must be a determination which does "not depend upon the agreement between the parties." MacKinnon L.J. thought that in this case the agreement of the parties was complete and nothing was left for them to agree. Whatever was lacking in their agreement could and should, he thought, be supplied by the court by invoking the standard of reasonableness, on the principles laid down by this House in *Hillas & Co.* v. *Arcos*, a decision which has not found a place in the Law Reports, even in a Note, but is reported in 147 L. T. 503, and in 36 Com. Cas. 353 and 38 Com. Cas. 23. The Lord Justice's view, as I have already indicated, was, if I have understood correctly, that there was a contract for a hire-purchase agreement and that no further agreement of the parties was necessary because the court could determine for the parties what was a reasonable hire-purchase agreement

(1) [1934] 2 K. B. 17, 21*n*.

(2) Ibid. 1.

H. L. (E.)
1940
SCAMMELL (G.) AND NEPHEW, LD.
v.
OUSTON (H. C. AND J. G.).
Lord Wright.

and thus the contract would be complete. I am unable to concur in this conclusion. In the first place the appellants at least in their letter of February 10, 1938, expressly stated that the transaction was subject to mutual acceptance of the hire-purchase agreement. This was not demurred to by the respondents. The letter was written before any difficulty had arisen about the condition or description of the Bedford van. It seems to me that this attitude was sensible both from the point of view of business and of law. It is here necessary to remember what a hire-purchase agreement is. It is not a contract of sale, but of bailment. The owner of the chattel lets it out on hire on a periodic rent on the terms that on completion of the agreed number of payments, and on due compliance with the various terms of the agreement, the hirer is to have the option to buy the chattel on payment of one shilling or some nominal sum. The condition that the hirer is not to become owner automatically on completion of the agreed payments but merely has an option to purchase was adopted to avoid difficulties under the Factors Act or the Bills of Sale Act, as explained by this House in *Helby* v. *Matthews* (1), and *McEntire* v. *Crossley Brothers, Ld.* (2). While the bailment continues the property remains in the letter. Such a transaction, though not a contract of sale, is used in practice to carry out a sale transaction, with the advantage to the buyer of credit facilities. Though the property in the chattel does not pass while the agreement is current, the hirer gets the use of it. What would be the price if it were a contract of sale has to be increased by whatever sum is necessary for interest and bank charges until the periodic instalments have been discharged. Terms must accordingly be arranged in respect of the period of the bailment as to user, repairs, insurance, rights of retaking possession on the hirer's default and various other matters. A hire-purchase agreement is therefore in practice a complex arrangement. Thus when in the letter of December 8, 1937, the condition of hire-purchase was introduced into what had seemed on the letters to be proceeding as a contract of sale, there was a complete change

(1) [1895] A. C. 471.

(2) [1895] A. C. 457.

H. L. (E.)
1940
SCAMMELL, (G.) AND NEPHEW LD. v. OUSTON (H. C. AND J. G.).
Lord Wright.

in the character of the transaction and a complex arrangement had necessarily to be substituted for a simple agreement to sell. It was not even clear who were to be parties to the hire-purchase agreement or what their respective roles were to be. The respondents it is clear were necessary parties. The appellants also were necessary parties because it was their chattel which was being dealt with. The finance company was also a necessary party. But there were at least two possible ways of carrying out the deal. The hire-purchase agreement might be in such terms that the appellants were the letters and the respondents the hirers, and the purchase price was to be discharged by periodic instalments in the form of negotiable instruments, payable to the appellants, thus enabling the appellants to discount the bills with the finance company, who on the security of the bills drawn by the respondents and endorsed by the appellants, would pay the appellants the purchase price at once, keeping as their eventual profit the extra amount which was added to the price for interest and bank charges. Such an arrangement must obviously involve the making of a special tripartite agreement. Another possible method would be for the appellants to agree with the respondents to sell the van to the finance company on the stipulation that the latter should agree to let the van to the respondents under a hire-purchase agreement. Clearly in that case also a special tripartite agreement would be necessary. There was, perhaps, a third possible mode under which the appellants sold the van for cash (at least as regards the balance, for the transaction was, in part, barter) to the respondents, who, having become purchasers, then transferred the van to the finance company on a hire-purchase agreement in consideration of the company advancing the price. Even in such a case the appellants would, I think, in practice be a necessary party because the finance company would require the undertaking of the appellants to transfer the van direct to them and the respondents' concurrence in that undertaking. Otherwise the finance company would be paying cash without at once obtaining their security in the form of the van. Thus a tripartite agreement would be necessary. But I need not consider that case because it was clearly not contemplated by the parties. The correspondence shows that the terms of the hire-purchase agreement were to be matters of joint concern to the three parties who were to agree upon them. What is clear is that while a hire-purchase agreement was being demanded, its exact form and its exact terms were left for future agreement. The true view may be that the letter of December 8, 1937, amounts to nothing more than an announcement that the deal is only to proceed upon a hire-purchase basis, the parties anticipating that the terms of such an agreement would be settled between them in due course.

What I have said will sufficiently explain why I do not feel able to agree with MacKinnon L.J. that there was a complete and enforceable agreement concluded between the parties. He cited *Hillas & Co.* v. *Arcos* (1) in support of his view, but that was a quite different case. There was in that case a contract for the supply of Russian timber in 1930, which also gave an option to the buyers to purchase a further supply of 100,000 standards in the ensuing year. The option clause was extremely bare and meagre, but it was held as a matter of construction that the 100,000 standards were to be soft wood goods of fair specification for delivery during 1931. It was decided by this House, reversing the judgment of the Court of Appeal and restoring the judgment of MacKinnon J., as he then was, that no further agreement was necessary or contemplated. The court could not, indeed, make a contract for the parties or go outside the words they had used except in so far as there were appropriate implications of law, as, for instance, the implication of what was just and reasonable where the contractual intention was clear but the contract was silent in some detail which the court could thus fill in. Thus the condition of "fair specification over the season" 1931 enabled the court with the help of expert evidence to identify what was a fair and reasonable specification and a fair and reasonable distribution by way of instalment deliveries of the contract quantity. Certain other matters were similarly dealt with.

---

(1) 147 L. T. 503; 36 Com. Cas. 353; 38 Com. Cas. 23.

H. L. (E.)
1940
SCAMMELL (G.) AND NEPHEW, LD.
v.
OUSTON (H. C. AND J. G.)
Lord Wright.

In the same way the court has in proper circumstances found itself able to determine what is a reasonable price when the price is not specified in the contract as was done in *Foley's* case (1), rightly, as I think, distinguishing *May & Butcher's* case (2), or to determine what is a reasonable time, or what are reasonable instalments. Many other examples of this principle might be given. And in addition the court may import terms on the proof of custom or by implication. But it is in my opinion a very different matter to make an entire contract for the parties as the court would be doing if the course suggested by MacKinnon L.J. was adopted. That is simply making a contract for the parties. The analogy he cited of a c.i.f. contract is in my opinion no true analogy. These initial letters have a definite and complete meaning under the law merchant, just as much as the meaning of a bill of exchange, or the general effect of a marine insurance contract, is determined by the law merchant. The law has not defined and cannot of itself define what are the normal and reasonable terms of a hire-purchase agreement. Though the general character of such an agreement is familiar, it is necessary for the parties in each case to agree upon the particular terms. It may, perhaps, be that this might be done in particular circumstances by general words of reference. For instance, if it were stipulated that there should be "a usual" hire-purchase agreement, the court might be able if supplied with appropriate evidence to define what are the terms of such an agreement. But there was nothing of the sort in this case.

I think this appeal should be allowed because I am of opinion upon either of the main grounds which I have explained, or on both of them, that there was no concluded contract between the appellants and respondents.

Appeal allowed.

Solicitors for appellants: *A. P. Browne & Co.*
Solicitors for respondents: *George L. Barnett & Co.*

---

(1) [1934] 2 K. B. 1.
(2) Ibid. 17n.

[PRIVY COUNCIL].

J. C.* MICHEL HABIB RAJI AYOUB AND OTHERS APPELLANTS;

1941 AND

March 11. SHEIKH SULEIMAN EL TAJI EL FAROUQI . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE, SITTING AS A COURT OF APPEAL.

Palestine — Contract — Sale of land — Breach — Liquidated damages— Penalty—Unenforceable—Introduction of English rules—Ottoman Code of Civil Procedure, arts. 111, 112*—Construction—Palestine Order in Council, No.* 1282 *of* 1922, *s.* 46*—Application.*

Sect. 46 of the Palestine Order in Council of 1922, which provides that the jurisdiction of the civil courts in Palestine shall be exercised in conformity with the Ottoman law there in force and " subject thereto, and so far as the same shall not extend " or apply, shall be exercised in conformity with the substance " of the common law, and the doctrines of equity in force in " England," has introduced into the legal concepts which form the jurisprudence of Palestine the difference between penalty and liquidated damages. When, therefore, the Ottoman code of Civil Procedure is applied to contracts, " damages " will be taken to mean " actual damages," and art. 111 of the code, which provides that: " If it is pointed out and provided in the body " of the contract that in the event of failure of any of the parties " in the carrying out of what he undertook, he pays to the other " party a fixed amount as damages, no greater or less should " be awarded," will only apply to an agreement which represents a " genuine pre-estimate of damages." Where there is such an agreed sum " no greater or less " can be awarded, but if the sum agreed is a penalty, whatever it may be called in the agreement, then the penal stipulation will not be enforced.

It appears more correct to say that the code must be construed in the light of the doctrines of English law rather than that the English principles relieve against the code, and if there is a clear and infrangible antinomy the code must prevail.

Judgment of the Supreme Court, sitting as a Court of Appeal, affirmed.

APPEAL (No. 30 of 1939) from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal (November 25, 1937), which had set aside a judgment of the District Court of Jaffa (June 17, 1937).

---

* *Present;* VISCOUNT SANKEY, LORD ATKIN, and LUXMOORE L.J.

J. C.
1941

Michel Habib Raji Ayoub v. Sheikh Suleiman El Taji El Farouqi.

By a contract in writing, dated November 12, 1929, the appellants agreed to sell to the respondent certain land in the district of Jaffa. The purchase price was to be paid as to £P200 on the signing of the agreement, when the purchaser was to be let into possession, and the balance by instalments. The agreement, which contained various stipulations by the parties as to payment of taxes, survey of the land, proof of registration, and the like, was subsequently varied by correspondence as to the date of the subsequent payments, but with an express stipulation that the remaining provisions of the agreement were to remain in force. The purchaser paid the initial £P200 on signature and went into possession, but it did not appear that he made any further payment. Clause 8 of the agreement provided that: "The second party [the purchaser] "shall pay to the first party £P2500 as agreed and liquidated "damages without the necessity of notice if he commits a "breach of all or part of his undertaking under this agreement." By the agreement as varied the purchaser was to pay £P400 by the end of February, 1931. On March 2, 1931, the vendors gave the purchaser written notice to pay the £P400 within three days, and on July 25, 1932, delivered their statement of claim in the present action, which pleaded the contract, averred two breaches in respect of the non-payment of taxes and the non-payment of the £P400, and claimed £P2500 as the agreed damages.

The District Court dismissed the action on the ground that the clause providing for the payment of the agreed damages did not apply to the varied contract. On appeal, the Court of Appeal held that the clause did apply to the contract as varied, and they allowed the appeal and gave judgment for the plaintiffs.

On further appeal to the Judicial Committee of the Privy Council (1) the defendant (the present respondent) argued that the plaintiffs' (the appellants') only remedy was under art. 112 of the Ottoman Code of Civil Procedure, that was, for interest on the unpaid sum of £P400. The appellants, on the other hand, argued that the case fell to be decided not under art. 112,

---

(1) (1934–35) L. R. Pal. 390.

J. C.
1941
Michel Habib Raji Ayoub v. Sheikh Suleiman El Taji El Farouqi.

but under art. 111 of the code. The Palestine courts had not in this case expressed any opinion on the Articles in question of the code, and the Judicial Committee, in the course of their judgment, said that (1): "It is quite impossible for their "Lordships to resolve this question, because they would "require to be advised on a matter of that kind and on the "construction of the original Turkish by the courts who do "in fact administer that particular law, and, therefore, it is "essential before their Lordships can determine that question ". . . . that it should be considered by the courts in Palestine "and that judgment should be given by the courts in accordance "with the code." The case was accordingly remitted to the District Court. The judgment of the Judicial Committee also drew the attention of the Palestine courts to s. 46 of the Palestine Order in Council, No. 1282, of 1922, stating that (2) "their Lordships think there can be no doubt that the provisions of the Order in Council do enrich the jurisdiction of "the courts in Palestine with all the forms and procedure "and all the different remedies that are granted in England "in common law and equity, and also enrich their jurisdiction "with the principles of equity, among other things, the well-"established distinction between a penalty and liquidated "damages."

At the remitted hearing the District Court decided that the case was governed by art. 111 of the code, and that the plaintiffs were entitled to the damages stipulated in clause 8 of the agreement, and judgment for the plaintiffs for £P2500 was accordingly entered. The Supreme Court, on appeal (Manning, Khaldi and Abdul Hadi JJ.) applying s. 46 of the Palestine Order in Council of 1922, introduced the English distinction between a penalty and liquidated damages and remitted the action to the District Court for the assessment of the actual damages sustained by the appellants by reason of the respondent's breach of the contract.

The appellants appealed.

The terms of arts. 111 and 112 of the Ottoman Code of Civil Procedure, and of s. 46 of the Palestine Order in

---

(1) (1934–35) L. R. Pal. 393. (2) Ibid. 394.

J. C.
1941
MICHEL HABIB RAJI AYOUB
v.
SHEIKH SULEIMAN EL TAJI EL FAROUQI.

Council of 1922 appear from the judgment of the Judicial Committee.

1941. Feb. 11. *Sir Thomas Strangman K.C.* and *Quass* for the appellants. The Ottoman law makes no distinction between damages and liquidated damages, and the question is whether that law has been abrogated by s. 46 of the Palestine Order in Council of 1922 so far as penalties are concerned. In view of the opening words of s. 46 of the Order in Council expressly saving such Ottoman laws as were in force at the date of the commencement of the order, there was in this particular case no room for the application of the words "the jurisdiction of "the civil courts . . . . shall be exercised in conformity with "the substance of the common law and the doctrines of equity "in force in England." So long as art. 111, which expressly allows for the enforcement of penalties, stands in the Code of Civil Procedure the English distinction between a penalty and liquidated damages cannot be introduced into the law of Palestine. Since 1922 the Palestine courts have consistently applied art. 111 of the code to cases where an English court would have refused to award the agreed damages on the ground that they were really penalties. In so applying art. 111 they have not been acting in defiance of s. 46 of the Order in Council, but in conformity with it. Moreover, since the judgment now under appeal was delivered, the Supreme Court of Palestine have expressed dissent from the judgment now under appeal on the ground that it nullifies a plain provision of the old Ottoman Code in force at the time of the Order in Council allowing for the enforcement of penalties: *Akel v. Alayyan* (1); *Paz v. Zeidan and Others* (2); and *Khoury Syndics* v. *Slavouski* (3). [Reference was also made to *Liphshitz* v. *Breir* (4) and *Abdullah Chedid and Others* v. *Tenenbaum* (5).]

Quass followed. There is no common law in Palestine, and the law relating to damages is to be found in arts. 106–112 of

(1) (1938) 5 Pal. L. R. 319.
(2) (1938) 5 Pal. L. R. 369.
(3) (1938) 5 Pal. L. R. 378.
(4) (1927) L. R. Pal. (1920–33), 123.
(5) (1933) L. R. Pal. (1920–33), 831.

J. C.
1941
Michel Habib Raji Ayoub
v.
Sheikh Suleiman El Taji El Farouqi.

the Code of Civil Procedure. In the case of a contract with a specific provision that an agreed amount of damages shall be awarded, the judge has no option but to give those damages.

The respondent did not appear and was not represented.

1941. Mar. 11. The judgment of their Lordships was delivered by Lord Atkin. This is an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, who set aside a judgment of the District Court of Jaffa in favour of the appellants, the plaintiffs in the suit, for £P2500 for breach of contract. The hearing in the District Court was the result of a decision of this Board on appeal in the same case, who, after judgments in the two courts in Palestine ultimately in favour of the plaintiffs, remitted the case for a further and fuller hearing.

The dispute between the parties arises out of a contract in writing, dated November 12, 1929, under which the appellants agreed to sell to the respondent certain land in the district of Jaffa. The purchase price was to be paid as to £P200 on the signing of the agreement, when the purchaser was to be let into possession, and the balance by instalments. There was a date fixed for completion, and there were various undertakings by either party, as to payment of taxes, survey of the land, proof of registration and the like. The agreement was subsequently varied by correspondence as to the date of the subsequent payments, with an express stipulation that the remaining provisions of the agreement remained in force. The purchaser paid the initial £P200 on signature and went into possession, but it does not appear that he made any further payment. There was in the agreement clause 8: "The "second party" (the purchaser) "shall pay to the first party "£P2500 as agreed and liquidated damages without the "necessity of notice if he commits a breach of all or part of his "undertaking under this agreement." There was a similar stipulation in the event of any breach by the vendors. By the varied agreement the purchaser was to pay £P400 by the end of February, 1931. On March 2, 1931, the vendors gave the purchaser written notice to pay the £P400 within three days, and on July 25, 1932, delivered their statement of claim in the present action, which averred the contract, averred two breaches in respect of the non-payment of taxes, and the non-payment of £P400, and claimed £P2500 as the agreed damages. The District Court dismissed the action on the ground that the clause relating to damages did not apply to the contract as varied. This was obviously wrong, and in effect the Supreme Court so held, and, treating this as the only issue, gave judgment for the plaintiffs. On appeal to the Privy Council this Board affirmed the opinion of the Supreme Court so far as it went, but, as it was apparent that other points raised by the purchaser had not been disposed of, remitted the case for further hearing. In their judgment they called attention to the provisions of s. 46 of the Palestine Order in Council, 1922, and to the introduction into the jurisprudence of Palestine of the provisions of the rules of the English common law and equity as there provided. It is plain that their Lordships studiously refrained from expressing any opinion as to the effect of this clause on the issues in this action and in this respect it would appear that one of the judges of the Supreme Court was under a misapprehension.

The questions that remained for consideration on the new trial, and have now been decided by the Supreme Court, arise out of the provisions of arts. 111 and 112 of the Ottoman Code of Civil Procedure. Unfortunately, disputes have arisen in this and other cases as to the correct translation of this code, which is in Turkish. Fortunately, in the present case we have translations into Arabic by two of the learned judges of the Supreme Court who were members of the Appeal Court, and their Lordships are able to approach this part of the case with some confidence that the English translation of the Arabic by the court interpreter conveys the true text. There were some slight verbal differences in the Arabic translations which did not affect the substance, and for the purpose of this decision their Lordships adopt the rendering of the senior of the two judges, Khaldi J.—" Art. 111. If it "is pointed out and provided in the body of the contract that "in the event of failure of any of the parties in the carrying "out of what he undertook, he pays to the other party a "fixed amount as damages, no greater or less should be "awarded. Art. 112. The damages to be awarded for failure "to carry out the undertaking which amounts to payment of "money, is a judgment for the interest at the rate of 1 per "cent. per month in respect of the capital amount. This "interest is awarded without calling on the creditor to show "that he suffered damage. If there is no agreement in the "document (Sanad) regarding the interest and interest is "claimed in respect of the debt in the notice, interest is "calculated from the date of the notice. If there is no notice, "interest is calculated from the date of the statement of "claim."

It is necessary now to refer to s. 46 of the Palestine Order in Council of 1922, which is as follows: "The jurisdiction of "the civil courts shall be exercised in conformity with the "Ottoman law in force in Palestine on November 1, 1914, and "such later Ottoman laws as have been or may be declared "to be in force by public notice, and such Orders in Council, "ordinances and regulations as are in force in Palestine at "the date of the commencement of this order, or may hereafter "be applied or enacted; and subject thereto, and so far as "the same shall not extend or apply, shall be exercised in "conformity with the substance of the common law, and the "doctrines of equity in force in England, and with the powers "vested in and according to the procedure and practice "observed by or before Courts of Justice and Justices of the "Peace in England, according to their respective jurisdictions "and authorities at that date, save in so far as the said powers, "procedure and practice may have been or may hereafter be "modified, amended or replaced by any other provisions. "Provided always that the said common law and doctrines of "equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of "His Majesty's jurisdiction permit and subject to such "qualifications as local circumstances render necessary."

The appellants contend that the case falls to be decided by the express provisions of art. 111 of the code, being Ottoman

J. C.
1941
Michel Habib Raji Ayoub
v.
Sheikh Suleiman El Taji El Farouqi

law in force at the material time; that it is only subject thereto that the common law and doctrines of equity are directed to be in force; and that there is, therefore, no support for the respondent's contention that the English distinction between penalty and liquidated damages has to be applied. That the stipulation as to £P2500 would be considered a penalty according to English rules was admitted by the appellants' counsel. There could hardly be a plainer case. For any failure to pay any of the instalments on due date, for failure to pay taxes, to take the agreed part in the appointment of a surveyor, this sum of £P2500 became payable. It was the contention of counsel, and it seems correct, that the recovery of this sum left the instalments still outstanding and that from time to time the agreed sum would be recovered as and when there was any breach. Their Lordships cannot hold that under the present system in Palestine such harsh and oppressive terms have to be enforced by the courts. The terms of art. 111 can be readily construed so as to afford the courts the means of giving relief against a merely penal stipulation. The code speaks in a legal system which does not know penalties as such—in which an agreement to pay damages must, therefore, be strictly enforced "no "more and no less." But when the difference between penalty and liquidated damages is introduced into the legal concepts which now, owing to s. 46 of the Order in Council, form the jurisprudence of Palestine, the terms of art. 111 can be given a plain and just meaning.

Agreed liquidated damages, if to be enforced, must be the result of a "genuine pre-estimate of damages," to use the illuminating phrase of Lord Dunedin. They do not include a sum fixed in terrorem covering breaches of contract of many varying degrees of importance, the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. It seems right, therefore, to conclude that now, when the code is applied to contracts, "damages" will be taken to mean actual damages, and the article will only apply to an agreement which represents "a genuine pre-estimate of damages."

Where there is such an agreed sum "no greater or less" can be awarded. But if the court, applying well known rules, has to conclude that the sum agreed was a penalty, whatever it may be called in the agreement, then the penal stipulation will not be enforced.

It results from what has been said that it appears more correct to say that the code must be construed in the light of the doctrines of English law rather than that the English principles relieve against the code. If there is a clear and infrangible antinomy the code must prevail. On this point, therefore, the appeal fails.

It nevertheless remains to consider the construction of art. 112. The action has been remitted to the District Court to assess the damage caused to the appellants by the breaches alleged, and, unless the plaintiffs can claim interest under the article, it seems difficult to see what other damage they could establish. The view taken by the majority of the Supreme Court was, apparently, that the article only applied to a single obligation to pay money. It may be supposed that a simple money bond, or a promissory note, would be instances. It was not considered applicable to a contract where there were reciprocal undertakings. On this point their Lordships agree with the Acting Chief Justice that the words of the article do not appear to be as limited in its scope as appeared to the other two learned judges. The promise to pay the purchase price in instalments is an "undertaking which "amounts to payment of money." A debt is constituted whether the price be for real or personal property, and whether it be due in one sum or in instalments, and it would appear irrelevant that there are other obligations outstanding on either side, if once it is established that a fixed sum is due and payable. It seems difficult to see why interest should be allowed on a single payment and not on instalments, or why, if in fact there has been a delay in making payment, the creditor should not be compensated because there are further and other obligations outstanding. At the hearing it would appear that the respondent contended for the construction now adopted, arguing that art. 112 provided the only remedy for delay in

J. C.
1941
Michel Habib Raji Ayoub v. Sheikh Suleiman El Taji El Farouqi.

payment, and that where it applied art. 111 had no operation. Their Lordships do not take this view. The two articles are independent, though when it comes to assessing the actual damages the plaintiffs may have to fall back on art. 112. What the effect may be of a suit to recover interest only, and not the principal, is a matter which was not discussed at the hearing, and no opinion is expressed on it. For the reasons above given, their Lordships will humbly advise His Majesty that this appeal be dismissed.

As the respondent has not appeared, there will be no order respecting costs.

Solicitors for appellants: *T. L. Wilson & Co.*

[PRIVY COUNCIL.]

J. C.*
1941
March 25.

HALL . . . . APPELLANT;

AND

KINGSTON AND SAINT ANDREW CORPORATION . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA.

Jamaica—Negligence—Personal injury—Liability of Municipal Corporation—Protective legislation—Construction—Jurisdiction of Court of Appeal to correct answer of jury—Public Health Law (No. 18 *of* 1925), *s.* 89, *sub-ss.* 1, 2—*Kingston and St. Andrew Corporation Law, No.* 12 *of* 1931, *s.* 223.

Sect. 89 of the Public Health Law, 1925, of Jamaica, affords protection only to persons being members of the public health authorities mentioned therein, and not to the authorities themselves as such, whether bodies corporate or incorporate, and, therefore, failure to comply with its provisions was no bar to an action by the appellant against the Kingston and St. Andrew Corporation for damages for personal injuries alleged to have been received as the result of the negligent driving of a refuse cart by one of the employees of the corporation.

The evidence established that when the accident occurred the cart was being driven in circumstances which rendered the corporation, and not the council of the corporation, liable for the injury caused, and, there having been no disregard of the provisions of s. 223 of the Kingston and St. Andrew Corporation Law, 1931, in accordance with which the appellant's action had been instituted, the section afforded the corporation no protection.

The Court of Appeal of Jamaica has jurisdiction to correct the answer of a jury to a question where the answer is wholly irreconcilable with the evidence.

Judgment of the Court of Appeal of Jamaica reversed.

APPEAL (No. 4 of 1940), by special leave in forma pauperis, from a judgment of the Court of Appeal of Jamaica (October 19, 1936), which reversed a judgment of Seton J., sitting with a jury (June 19, 1936).

On November 13, 1934, the appellant, Olga Hall, then about seven years old, suing by her father, Bryan Hall, as her next friend, brought an action against the respondent, the Kingston and St. Andrew Corporation claiming damages for personal injuries which she alleged that she had received on June 15,

---

* *Present:* VISCOUNT SANKEY, LORD ATKIN, and LUXMOORE L.J.

1934, in New Lincoln Road, St. Andrew, as the result of the negligent driving of a refuse cart by one Mortimer Brown, an employee of the corporation. By its defence the corporation denied that the plaintiff was injured by the defendants' cart as alleged, and further contended that the cart alleged to have caused the injuries, "was being used by and on behalf of "the council of the Kingston and St. Andrew Corporation as "the local board of health for the parishes of Kingston and "St. Andrew, and under and in obedience to and in the "execution of the duties created by s. 22, sub-s. 2 (*a*), of the "Public Health Law (No. 18 of 1925). The said cart at all "material times was and is the property of the council of the "Kingston and St. Andrew Corporation, and the driver was "and is the servant of the said council pursuant to and for "the purposes of the said section." The corporation further pleaded "that the action was barred by the provisions of "s. 89, sub-ss. 1 and 2, of the said Law as no notice or no "proper notice of action was given and the amount of damages "claimed was not specified, and the action was not com"menced within three months after the thing done in respect "of which action is brought."

The action was tried before Seton J., sitting with a jury, and at the conclusion of the evidence the jury, in answer to specific questions, found that the plaintiff was injured by a cart running over her foot, that the cart was driven by Mortimer Brown, and that the injury was caused by the negligent driving of the cart. Question 4: "Was the cart "at the time of the accident engaged exclusively in the "collection and removal of sweepings, rubbish, refuse, night-"soil or other waste matter from private premises or public "places?," was answered by the jury in the negative. In the result, they awarded the plaintiff 8*l*. 19*s*. 6*d*. special damages, and 300*l*. general damages, and judgment was entered in her favour for those sums, with costs.

On appeal by the corporation to the Court of Appeal (Furness C.J. and Sherlock J.) the Court set aside the jury's answer to question 4, and substituted its own affirmative answer on the ground that to answer that question in the negative was wholly irreconcilable with the evidence. The Appeal Court further held that "in our view the only inference "to be drawn from the answer to question 4 which we have "substituted for that of the jury is that at the time of the "accident Brown was using the cart in pursuance of duties "imposed by the Public Health Law, 1925. It follows that, "whether his employer should properly be said to have been "the corporation, or . . . . the council of the corporation, that "employer's rights and liabilities are governed by the Public "Health Law, 1925." The Court, therefore, held that the notice of action was bad as it did not specify the amount of damages claimed, as required by s. 89, sub-s. 1, and was also out of time in accordance with sub-s. 2 of s. 89, and they allowed the appeal, with costs.

1941. Feb. 10. *Pritt K.C.* and *Colombos* for the appellant. Admittedly, the requirements of the Public Health Law of 1925 have not been fulfilled by the appellant because her notice of action did not specify the amount of damages claimed and her action was not brought within the three months, but, to obtain the protection afforded by the Law of 1925, the corporation had to satisfy the jury that the cart at the relevant time was engaged on public health work, particularly the removal of household refuse. It was open to the jury to find that the corporation had not discharged the onus, which lay on it, of proving affirmatively that the cart was exclusively so used. The Court of Appeal erred in substituting its own finding for that of the jury on a pure question of fact. [Reference was made to the Public Health Law, 1925, ss. 22 and 89; to the Kingston and St. Andrew Corporation Law, 1931, ss. 9, 192 and 223; and the Parochial Boards Law (Laws of Jamaica, 1938, c. 35), s. 3.] The question whether the cart belonged to the corporation or the council of the corporation or the local board of health was a mere technicality, as they are all parts of the same corporation and liable for the acts of their servants and agents. On the construction of the Law of 1925 it is submitted that incidental negligence in the course of doing the act authorized is not protected as part of the doing of the act. The negligent act of the driver of the cart was not done "in the execution of the duties" created by the Law of 1925. In any event, it is contended that s. 89 does not cover an action against the actual local body, but only actions against persons, i.e., the members of the local bodies specified, and, therefore, gives no protection to the corporation as such. The appellant's action was properly commenced and instituted in accordance with the provisions of s. 223 of the Kingston and St. Andrew Law, 1931, and the award of the jury ought to stand. The only thing that the Court of Appeal in Jamaica could do was to set aside the award as perverse, and order a new trial: Civil Procedure Code (Laws of Jamaica, 1938, c. 463), ss. 338, 570, 575.

The respondent corporation did not appear and were not represented.

Feb. 10. Their Lordships announced that the appeal would be allowed.

Mar. 25. The reasons for the judgment of their Lordships were delivered by Luxmoore L.J. On November 13, 1934, Olga Hall, who was then about seven years old, acting by her father as her next friend, sued the Kingston and St. Andrew Corporation (hereinafter called "the corporation") for damages for personal injuries. It was alleged that the injuries were caused on June 15, 1934, by the negligent driving by one Mortimer Brown, an employee of the corporation, of a cart marked K.S.A.C. Number 11, one of the wheels of which passed over and crushed the plaintiff's foot. The corporation denied that any injury was caused by the cart because no part of it ever came in contact with the plaintiff. The corporation also alleged that on June 15, 1934, the cart in question was being driven by Mortimer Brown on behalf of the council of the corporation under and in obedience to and in execution of duties imposed on the council by s. 22, sub-s. 2 (*a*), of the Public Health Law, 1925, of Jamaica, and that the cart was the property of the council and Mortimer Brown was the servant of the council. The corporation consequently claimed that the action was improperly constituted, and that the council of the corporation and not the corporation was the

J. C.
1941
Hall
v.
Kingston
and
St. Andrew
Corporation.

proper defendant. The corporation further claimed that, if the action was maintainable, the corporation was acting pursuant to and in execution of the duties created by s. 22, sub-s. 2 (*a*), of the Public Health Law, 1925, and that the action was barred by the provisions of s. 89, sub-ss. 1 and 2, of that Law, in that no proper notice of action was given and the amount of damages claimed was not specified, and the action was not commenced within three months after the alleged accident.

The action was tried before Seton J. sitting with a jury. Five questions were left to the jury, namely: (1.) Was the plaintiff injured by a cart running over her foot? If so, (2.) Was the cart driven by Mortimer Brown? If so, (3.) Was the injury caused by the negligent driving of the cart? If so, (4.) Was the cart at the time of the accident engaged exclusively in the collection and removal of sweepings, rubbish, refuse, night-soil or other waste matter from private premises or public places? (5.) Damages—(i.) Special; (ii.) General. The jury answered the first three questions in the affirmative and the fourth question in the negative, and fixed the special damages at 8*l.* 19*s.* 6*d.* and the general damages at 300*l.* Seton J. accordingly, on June 19, 1936, entered judgment for the plaintiff for 308*l.* 19*s.* 6*d.*, with costs.

The corporation appealed from this judgment to the Court of Appeal of the Supreme Court of Judicature in Jamaica (hereinafter called the Court of Appeal). The material grounds on which this was based were (1.) that the answer in the negative by the jury to question 4 was against the weight of evidence and was perverse. (2.) That the driver of the cart which was alleged to have occasioned the injuries was at the material time engaged in using the cart to remove rubbish pursuant to and in performance of the Public Health Law, 1925, s. 22, and consequently—(*a*) the action was brought out of time having regard to s. 89, sub-s. 2, of the said Law; (*b*) the notice of action was bad in that it did not state the amount of damages claimed as required by s. 89, sub-s. 1, and (*c*) the corporation was not the proper defendant.

The appeal was heard by Sir Robert Furness C.J. and

Sherlock J. On October 19, 1936, they set aside the jury's answer to question 4, holding that a negative answer was wholly irreconcilable with the evidence, and substituted for it an answer in the affirmative. The Court of Appeal, in the course of its judgment, stated: "In our view the only inference "to be drawn from the answer to question 4 which we have "substituted for that of the jury is that at the time of the "accident Brown was using the cart in pursuance of duties "imposed by the Public Health Law, 1925. It follows that "whether his employer should properly be said to have been "the corporation or should properly be said to have been the "council of the corporation the employer's rights and liabilities "are governed by the Public Health Law, 1925." The Court of Appeal also held that the action was out of time because, whether the corporation or the council of the corporation was the proper defendant, the requirements of s. 89, sub-ss. 1 and 2, had not been fulfilled. The Court of Appeal, accordingly, set aside the judgment of the court below and entered judgment for the defendant, with costs, except as to the costs of a particular summons in the action which were awarded to the plaintiff and directed to be set off against the general costs of the action. On July 25, 1939, the plaintiff obtained special leave from His Majesty in Council to appeal in forma pauperis from the judgment of the Court of Appeal.

The case for the appellant was filed in due course, but no case has been filed on behalf of the corporation, nor did the corporation appear at the hearing of the plaintiff's appeal before their Lordships. Counsel for the plaintiff contended (1.) that the Court of Appeal erred in substituting its finding for that of the jury on a pure question of fact. (2.) That the question of the ownership of the cart and the uses to which it was put, and whether it belonged to the corporation or the council of the corporation, was a mere technicality, as the council of the corporation is part of the corporation and the corporation is liable for the acts of its servants and agents. (3.) That the plaintiff's action was properly instituted in accordance with the provisions of s. 223 of the Kingston and St. Andrew Corporation Law, 1931. Their Lordships have

J. C.
1941
HALL
v.
KINGSTON
AND
ST. ANDREW
CORPORATION.

considered the note made by Seton J. of the evidence adduced at the trial with regard to the user of the cart in question at the date when the accident to the plaintiff occurred. The material evidence with regard to these matters was given by the driver, Mortimer Brown, and by Chief Sanitary Inspector Codling. Mortimer Brown stated in his evidence in chief that he was a cartman. He said: "I drive a garbage cart. "Mr. Codling is my master. He is chief sanitary inspector of "St. Andrew. When garbage is collected I dump it. I drive "cart No. 11. I have been doing this work nearly four years. "I have never done any work but this under Mr. Codling. "The cart is specially constructed for rubbish. On Friday, "June 15, 1934, I was collecting garbage." In cross-examination he said: "I am still employed by the corporation. "Corporation carts are marked K.S.A.C. I still drive No. 11." Mr. Codling, the chief sanitary inspector, said in his evidence in chief: "Brown drives cart No. 11. No. 11 is used solely "for sanitary purposes, i.e., picking up household rubbish. "It has never been used for any other purpose. On June 15, "1934, I can say cart No. 11 was solely being used for that "purpose." In his cross-examination he said: "The cor-"poration pay Brown. They pay me too. This cart [meaning "cart No. 11] is the property of the corporation. The carts "are all numbered . . . . they are all marked K.S.A.C."

Mr. Pritt, on behalf of the appellant, urged that the jury were entitled to ignore the whole of this evidence because they refused to accept either Brown or Codling as truthful witnesses in their denials that the injuries to the plaintiff were caused by the cart driven by Brown. Their Lordships are unable to accept this argument, and find themselves in complete agreement with the opinion expressed by Sir Robert Furness C.J. and Sherlock J. that a negative answer to question 4 is wholly irreconcilable with the evidence, and they are satisfied that the Court of Appeal had ample jurisdiction to correct the answer to question 4 in the manner already mentioned.

The Court of Appeal held that it was unnecessary to decide whether the corporation or the council of the corporation was the proper defendant to the action because the non-compliance

J. C.
1941
HALL
v.
KINGSTON
AND
ST. ANDREW
CORPORATION.

by the plaintiff with the requirements of s. 89 of the Public Health Law, 1925, afforded a complete answer to the plaintiff's claim. Sect. 89, sub-s. 1, provides that no action "shall be "brought and instituted against any member of the Central "Board or any local board or a health officer or any sanitary "inspector or any assistant or other employee of the Central "Board or any local board in respect of any act done in "pursuance or execution or intended execution of this Law ". . . . until the expiration of one month's notice in writing "of such intended action . . . . given by the person complaining "to the person concerned, specifying the act or injury com-"plained of and the amount of damages claimed therefor." Sub-s. 2 of the same section provides that any action for anything done in pursuance or execution or intended execution of that law "shall be commenced within three months after the "thing done, and not otherwise, or in the case of a continuous "injury or damage, within six months next ensuing after the "cessation thereof." Sub-s. 1, on its true construction, appears to their Lordships to afford protection to persons only and not to bodies corporate or incorporate. The actions in respect of which the required notices are to be given as a condition precedent to their institution are actions against "any member of the Central Board or any local board." The word "member" is qualified in each case by the reference to the Central Board and also to the local board. Further, the notice required is to be given to the person concerned. The Central Board is incorporated under the name of the Central Board of Health by s. 3 of the Public Health Law, 1925. By s. 7 of the same Law it is provided that the council of the Kingston and St. Andrew Corporation shall be the local board for the parishes of Kingston and St. Andrew, while in other parishes the parochial boards of such parishes are to be the local boards. Sect. 22 provides, so far as is material to be stated, that every local board "shall provide and maintain "(*a*) an efficient service of sanitary carts and scavengers . . . . "for . . . . the collection and removal of sweepings, rubbish, "refuse, night-soil, and other waste matter from private and "public places." At all material times the council of the

J. C.
1941
Hall
v.
Kingston
and
St. Andrew
Corporation.

Kingston and St. Andrew Corporation was not a corporation, nor is it now incorporated. It was at all material times a body set up by the Kingston and St. Andrew Corporation Law, 1931. By this Law (s. 4, sub-s. 1) the inhabitants of the parish of Kingston and the parish of St. Andrew are declared to be a Municipal Corporation bearing the corporate name of the Kingston and St. Andrew Corporation, and by such name is given perpetual succession. By s. 9, sub-s. 1, of the same Law it was provided that the corporation should be capable of acting by the council, and that the council should exercise all powers vested in the corporation or the council by this Law or otherwise. Sub-s. 2 provided that the council should consist of the mayor, aldermen and councillors. By a fasciculus of clauses contained in Part VII. of the same Law, under the heading "Rates," and numbered 107–111 inclusive, it is provided that rates are to be raised, levied, collected and paid to the council and paid over to the town clerk for the purposes of the corporation. By s. 192 the funds or money belonging or payable to and collected by the council under and by virtue of this or any other Law shall, after due provision has been made with the approval of the Governor in Privy Council for interest and sinking fund on any loans for which the council is liable or responsible under this or any Law, be applicable towards payment of . . . . (*i*) the disposal and destruction of street and house refuse and rubbish, (*j*) the maintenance and preservation of all corporate property, (*k*) the payment of any sums payable by the council under any judgment of any Court of Law, and (*l*) generally, towards the payment of all expenses of and incidental to the carrying out of the provisions of this Law, and of all works and matters incidental thereto. Sect. 223 provides that "all actions and "proceedings to be commenced against the corporation or "any person or persons for anything done in pursuance or "intended pursuance of this Law, shall be commenced within "six months after the act committed and not otherwise and "notice in writing of such action or proceedings and of the "cause thereof shall be given to the Council, member or "person against whom it is intended to bring such action or "proceedings one calendar month at least before the commencement thereof, . . ."

For the reasons already stated, their Lordships are of opinion that s. 89 has no application to the corporation as such, and that the Court of Appeal was in error in holding that the action was barred by that section, although admittedly no notice in accordance with its requirements was given on behalf of the plaintiff before the action was instituted and the writ was issued more than three months after the date when the injuries were inflicted. Further, their Lordships are satisfied that the evidence proves conclusively that the cart K.S.A.C. No. 11 was the property of the corporation and that its driver, Mortimer Brown, was the servant of the corporation, and that the cart in question was being driven when the accident occurred in circumstances which rendered the corporation, and not the council of the corporation, liable for the injury caused by the negligence of their servant, Brown. Sect. 223 of the Kingston and St. Andrew Corporation Law, 1931, does not afford any protection to the corporation because there has been no disregard of any of its provisions.

For these reasons, their Lordships are of opinion that the plaintiff is entitled to recover the 308*l.* 19*s.* 6*d.* awarded to her by the jury and for which judgment was entered in her favour by Seton J. They have, therefore, humbly advised His Majesty in Council that this appeal should be allowed, with the costs of the appeal to the Court of Appeal, the judgment of Seton J. restored, and that such costs of this appeal as are proper to be awarded to the plaintiff suing in forma pauperis should be ordered to be paid to her by the respondent corporation.

Solicitors for appellant: *Hy. S. L. Polak & Co.*

[PRIVY COUNCIL.]

J. C.*
1941
April 8.

DILLON . . . . APPELLANT;

AND

PUBLIC TRUSTEE OF NEW ZEALAND AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Family provision—Devise in will in fulfilment of contract inter vivos—Power of Court to redistribute estate—Discretion—Family Protection Act, No. 60 *of* 1908, *s.* 33, *sub-s.* 1.

By s. 33, sub-s. 1, of the Family Protection Act, 1908, of New Zealand: "If any person (hereinafter called the 'testator') dies "leaving a will, and without making therein adequate provision "for the proper maintenance and support of the testator's wife, "husband, or children, the court may at its discretion, on application by or on behalf of the said wife, husband, or children, "order that such provision as the court thinks fit shall be made out "of the estate of the testator for such wife, husband, or children."

Held, that there is nothing in this sub-section which restricts the power of the court to redistribute the estate of a testator in a case in which the provisions in the will are a fulfilment of a contract entered into inter vivos. That contract cannot oust the jurisdiction of the court.

The Act affects the unqualified operation of a contract to make a will in a particular form, whether the contract is fulfilled or whether it is broken.

The court, in considering how its discretion should be exercised and how far it is just and necessary to modify the provisions of a will, will pay regard to the circumstances in which the will is drawn as it is, to the interests of the members of the family, and to all relevant circumstances, among which may be the fact that the testator was under obligation to a third party.

Judgment of the Court of Appeal of New Zealand [1939] N.Z.L.R. 550, reversed.

APPEAL (No. 1 of 1940) from a judgment and order of the Court of Appeal of New Zealand (July 7, 1939) which had reversed a judgment and order of Northcroft J. in the Supreme Court (August 12, 1938).

Henry Dillon, a farmer, by his first wife had two sons,

---

* *Present:* VISCOUNT SIMON L.C., VISCOUNT MAUGHAM, LORD THANKERTON, LORD WRIGHT, and LORD PORTER.

Henry Dillon and Michael Francis Dillon, and three daughters, Mary Kathleen Dillon (now married), Eileen Dillon, and Elsie Higgins. Under an agreement between the father and his sons, dated February 2, 1933, and made after the death of his first wife, it was provided (inter alia) that Henry Dillon, junior, was to be appointed manager of all the farm lands, which were to be worked together as one sheep and cattle farm, and was to devote his whole time to the work, and Michael Francis was to devote his whole time to that work as a general hand. Clause 17 of the agreement stipulated that "the said "Henry Dillon, senior, shall by his last will devise and bequeath "his own farm lands to his trustees upon trust for his son "Henry Dillon, junior, and his two daughters, Mary Kathleen "Dillon and Eileen Dillon, in equal shares, subject, however, "to an annuity or rent charge of fifty pounds (50*l.*) per annum "in favour of his daughter, Elsie Higgins, and shall forthwith "execute a will containing such devise and bequest." On August 24, 1935, Henry Dillon, senior, married as his second wife the appellant, Amy Dillon. There was no issue of that marriage. On March 17, 1936, Henry Dillon, senior, executed a will by which he devised and bequeathed his farm lands pursuant to clause 17 of the agreement of February 2, 1933, and the residue of his estate to the appellant. The Public Trustee of New Zealand was appointed executor and trustee under the will. The testator died on January 29, 1937. At his death his gross assets amounted to 9175*l.*, and his liabilities to 3334*l.*, leaving a net estate of 5841*l.* Of that sum 3875*l.* was the estimated value of the benefits to be received by the three devisees under the clause in the will which conformed to the agreement of February 2, 1933. The net residual estate given to the appellant was equivalent to 1416*l.*

By an originating summons, dated July 28, 1937, the widow made an application under s. 33, sub-s. 1, of the Family Protection Act, 1908, in the Supreme Court of New Zealand, alleging that what she received under her husband's will was not, in all the circumstances, "adequate provision for her "proper maintenance and support," and she asked the court to exercise its discretion and to order further provision for her out of the estate of the testator. Northcroft J., in the Supreme Court, gave judgment in favour of the appellant, holding that the court was not precluded by the agreement of February 2, 1933, from encroaching on the devise of farm lands to the testator's children should it be necessary so to do to make adequate provision for his widow. He ordered the transfer to the appellant of the dwelling-house, valued at 480*l.*, less a mortgage of 173*l.*, to which she was entitled under the will, to be made free of the incumbrance, and for a further provision of a total income of 150*l.* a year. On an appeal by the children of the testator to the Court of Appeal of New Zealand (Myers C.J. and Ostler J., Smith J. dissenting) it was held that, as the provision in the will for the children was made in fulfilment of a contract for valuable consideration, the court had no jurisdiction to make an order under s. 33, sub-s. 1, of the Family Protection Act, which would cut down what the testator had, in fulfilment of his promise, left to his children. The appeal is reported at [1939] N. Z. L. R. 550.

The widow appealed.

1940. Dec. 2, 4. *H. E. Salt* for the appellant. The Court of Appeal was wrong. A specific devise in a will made pursuant to a contract inter vivos is not entitled to prevail against the statutory discretion of the court. A person can preclude the operation of the Act, and, therefore, the discretion of the court, by disposing inter vivos of items of his property, either voluntarily or for value, so that they never become part of his estate on which his will or the Act can operate, but he cannot oust or cut down the operation of the Act on his estate at his death by fettering in advance his powers of testamentary disposition, and that is true whether the attempt be made for value or voluntarily. If such an attempt to fetter the power of testamentary disposition is made, it is liable to be overreached either wholly or pro tanto by the court in its discretion under the Act. Where, as in this case, the contract has been fulfilled, it is irrelevant to consider what would have happened if there had been a breach of the contractual obligation. So far as concerns the three daughters of the testator, they are volunteers

J. C.
1941
DILLON
v.
PUBLIC
TRUSTEE OF
NEW
ZEALAND.

taking the mere bounty of the testator, and the jurisdiction of the court under the Act cannot in any event be ousted so far as concerns benefits conferred on volunteers. By the overriding requirements of the Act the whole of the testator's estate was liable to be applied in making adequate provision for his dependants, and all his testamentary dispositions, including the devise and bequest made pursuant to the agreement, were liable to be varied by the court in exercise of its jurisdiction under that Act. The authorities relied on by Myers C.J. in the Court of Appeal (*Hammersley* v. *De Biel* (1) and *Coverdale* v. *Eastwood* (2)) were decided quite irrespective of any such legislation as that now in question. [Reference was also made to *Bosch* v. *Perpetual Trustee Co.* (3) and *Jervis* v. *Wolferstan* (4).] Assuming that the court has jurisdiction, it should be exercised in favour of the appellant. It is relevant to consider all the circumstances, including the agreement of February, 1933, but that agreement could not take into account the position of the future wife of the testator at his death. The court should override the will, seeing that it was made in pursuance of an agreement in which the appellant's position was not considered.

T. B. W. Ramsay for the respondents, the children of the testator. There appears to be no authority on this particular point either in the Courts of New Zealand or Australia, but *Bosch* v. *Perpetual Trustee Co.* (3) contains propositions which are of importance. [Reference was also made to *Allardice* v. *Allardice* (5).] The majority of the Court of Appeal in New Zealand were right in holding that in view of the agreement of February 2, 1933, the court had no jurisdiction to modify the will. The agreement was for valuable consideration, and a promise on valid consideration to make a certain disposition of property by will is legally binding on the promisor. [Reference was made to [1937] W. N., Pt. II., 292, para. 42.]

J. H. Stamp for the Public Trustee of New Zealand, submitted that in any order made for the benefit of the appellant under the Act express directions should be given in relation to the source and raising of any sum of money required to be found pursuant to the order, and to the incidence of any capital or income payment as between the respondents, the annuitant, and the devisees of the testator's farm lands.

---

(1) (1845) 12 Cl. & F. 45.
(2) (1872) L. R. 15 Eq. 121.
(3) [1938] A. C. 463, 477.
(4) (1874) L. R. 18 Eq. 18, 24.
(5) [1911] A. C. 730.

H. E. Salt replied. There is no need to remit the case for consideration. If the Board are satisfied that there is jurisdiction they should not disturb the exercise of the discretion of the judge at first instance who had the agreement before him as well as all the other circumstances. There is no reason to think that he did not have regard to all those circumstances. I agree to take the order of Smith J., the dissenting judge in the Court of Appeal, rather than have the matter reopened.

1941. April 8. The judgment of their Lordships was delivered by Viscount Simon L.C. This is an appeal from a judgment of the Court of Appeal of New Zealand (Myers C.J., Ostler and Smith JJ.) delivered on July 7, 1939, allowing by a majority (Smith J. dissenting) an appeal by the respondents other than the Public Trustee of New Zealand from an order of the Supreme Court made by Northcroft J. on August 12, 1938, whereby, on an application by originating summons taken out by the appellant, it was ordered, pursuant to the Family Protection Act, 1908, of New Zealand, that further provision as set out in the order should be made in favour of the appellant out of the estate of her deceased husband, Henry Dillon, senior.

Henry Dillon, senior, was twice married. By his first wife he had two sons and three daughters. The appellant was his second wife, and the wedding took place on August 24, 1935, when her husband was 81 years of age and she herself was 50. He died on January 29, 1937, leaving a will, dated March 17, 1936, under the terms of which he appointed the Public Trustee of New Zealand to be his executor and trustee. He specifically devised all his farming lands to three of his children by his first wife, namely, Henry Dillon, Mary Kathleen Dillon (now a married woman, named Mrs. Stuart), and Eileen

Dillon, in equal shares, subject to subsisting mortgages and charges, and subject also to the payment thereout of an annuity of 50*l.* a year in favour of Elsie Higgins (another daughter by his first wife) during her lifetime. Apart from this specific devise (which, as will be seen later, was in due performance of a contract so to frame his will which he had made for good and valuable consideration with his sons, Henry Dillon and Michael Francis Dillon, on February 2, 1933), he devised and bequeathed the whole of his estate, both real and personal, after paying debts, funeral and testamentary expenses, and death duties, on trust for his widow, the appellant, Amy Dillon, absolutely.

Henry Dillon senior's first wife had died before the agreement of February 2, 1933, was made, and he had not at that date married a second time. Accordingly, the agreement amounted to a family arrangement between a widower and his children at a time when there was no wife to consider. The general nature of the arrangement provided for by the agreement was that all the farm lands, in which Henry Dillon, senior, and his two sons were respectively interested, should be worked together as one sheep and cattle farm; that Henry Dillon, junior, should devote his whole time and energy to the management of the farming business; and that the other son, Michael Francis Dillon, should work as a general hand on the farm. Henry Dillon, senior, forthwith gave to each of his two sons a one-third share in all his stock of every description on the farm lands, and also released to Michael Francis Dillon a sum of 2000*l.*, which was secured by mortgage given by the latter to the former. The business was to be carried on on a partnership basis as long as Henry Dillon, senior, lived, and there was to be paid out of the partnership banking account weekly wages to each of the two sons, and also to Mary Kathleen Dillon and Eileen Dillon (the remaining sister, Elsie, had already married), as well as other specified expenditure, before arriving at the balance of profit which was to be divided annually in equal shares between the three parties to the agreement. [His Lordship read clause 17 of the agreement and continued:] Henry Dillon, senior, duly fulfilled the obligation of this clause by making a will in the terms stipulated. His subsequent marriage with the appellant invalidated this will, but his final will, made on March 17, 1936, reproduced the provisions which he had agreed to make in favour of his children. The residue of his estate he left, as already stated, to the appellant. At his death the gross assets of the testator amounted to 9175*l.*, and his liabilities to 3334*l.*, leaving a net estate of 5841*l.* Of this net estate 3875*l.* was the estimated value of the benefits to be received by the three devisees under the clause in his will which conformed to the agreement he had made. The net residual estate, which was given to the appellant, was equivalent to 1416*l.*

The Family Protection Act, 1908, of New Zealand, is divided into two parts. Part I., with which we are not in this case directly concerned, deals with "family homes' protection," and Part II. deals with "testator's family maintenance." [His Lordship read s. 33, sub-s. 1, which is in Part II.] The contention of the appellant was that what she received under her husband's will was not, in all the circumstances, "adequate "provision for her proper maintenance and support," and accordingly she applied to the court to exercise its discretion and to order further provision out of the estate of the testator for herself. The necessary effect of such an order would, of course, be to reduce the benefits passing to her step-children under the will. In opposition to this application it was argued before Northcroft J. that the provisions which the will contained in favour of the testator's children were made in strict conformity with clause 17 of the agreement of February 2, 1933, and that, since additional provision for the widow could only be secured by encroaching on the contractual devise, the court had no power to vary the provisions of the will in the appellant's favour. Northcroft J., however, ruled that the court was not precluded from encroaching on the devise of farm lands to the testator's children should it be necessary to do so to make adequate provision for his widow. The learned judge proceeded as follows (1): "Upon the facts of "this case there is no suggestion that the widow's claim lacks

(1) [1938] N. Z. L. R. 695.

"merit. It is true that the testator was a very old man at "the time of the marriage, and that he died within eighteen "months. At the same time he assumed responsibility for his "wife when he married her, and was under an obligation "imposed upon him by the statute to make adequate testamentary provision for her proper maintenance and support, "and this, I think, he has failed to do. The affidavits filed "contain no criticism of the plaintiff nor of her claim, nor is "there any evidence that the circumstances of the testator's "first family are such that it will be a hardship to them to "resort to their gifts under the will to supplement the provision "to the widow."

Their Lordships cannot regard it as a correct exposition of s. 33 of the Family Protection Act to say that it imposes on a husband the obligation to make adequate testamentary provision for the maintenance and support of his wife. The statute does not impose any duty to frame a will in any particular way, and the testator did not fail to observe any statutory obligation by making his will as he did. What the statute does is to confer on the court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contains. If the testator does not make adequate provision in his will for wife, husband, or children, he does not thereby offend against any legal duty imposed by the statute. His will-making power remains unrestricted, but the statute in such a case authorizes the court to interpose and carve out of his estate what amounts to adequate provision for these relations if they are not sufficiently provided for. The interposition of the court should take place, of course, only after considering all relevant circumstances, and among these circumstances may be the fact that the testator was under obligation to third parties.

The trial judge, having come to the conclusion that the appellant's claim was well-founded in fact in that she was inadequately provided for by the will, and having observed that there was no evidence to show that it would be a hardship on the respondents to reduce their benefits under the will in order to find a supplementary provision for the widow, considered the figures and came to the conclusion that two changes should be made in her favour. The will already gave the appellant a house, valued at 480*l.*, but this house was subject to a mortgage of 173*l.* The learned judge's order gave the house to the appellant free of encumbrance, and consequently the amount needed to pay off the mortgage would have to be found from some other source. Secondly, Northcroft J. further changed the effect of the will by providing that the farming lands should be charged in the appellant's favour with an annuity, which would bring up her total income derived from the testator's estate to 150*l.* a year. All parties were to have liberty to apply to the court if alteration of circumstances made this proper.

The children, whose benefits under their father's will were thus reduced, appealed to the Court of Appeal in New Zealand on the ground that Northcroft J.'s judgment "is erroneous in "fact and law." Myers C.J. and Ostler J. took the view that, inasmuch as the provision in the will for the children was made in fulfilment of a contract for valuable consideration contained in clause 17 of the agreement, the court had no jurisdiction to make an order under s. 33 of the Family Protection Act which, for the purpose of increasing the widow's share, would cut down what the testator had, in fulfilment of his promise, left to his children. Their Lordships cannot accept this view. Myers C.J. truly observed that if Henry Dillon, senior, had transferred his lands to his children during his lifetime, the Family Protection Act could not operate upon them. This is plainly the case, for s. 33 of the Act only applies if the testator dies leaving a will without making adequate provision therein for the proper maintenance and support of the testator's wife, etc. If these conditions are fulfilled, the court has jurisdiction, at its discretion, to order that such additional provision as the court thinks fit shall be made for the inadequately provided wife out of the testator's estate. There can be no dispute or doubt that the lands left

J. C.
1941
Dillon
v.
Public
Trustee of
New
Zealand.

to the children form part of the testator's estate, and the children are bound to accept the position that the provision made for them is liable to be reduced by order of the court in favour of their stepmother, unless, indeed, their claim on the estate could be regarded as constituting a debt which has to be discharged before benefits are distributed. But these devisees are not creditors of the estate. They are beneficiaries under the will. There is nothing in the nature of a debt owing to the children from the testator's estate. The testator has done what he contracted to do, namely, to make the testamentary provisions defined in clause 17 of the agreement. The testator is under no reproach in the matter at all. His will duly provides for the fulfilment of his contract with his children and gives all that is left for distribution to their stepmother. But the contract cannot oust the jurisdiction of the court, and there is nothing in s. 33 of the Family Protection Act which restricts the court's power to re-distribute the estate in cases where the provisions in the will are a fulfilment of a contract entered into inter vivos. For these reasons their Lordships are not able to agree with the view of Myers C.J., when he says at the end of his judgment (1) : "A person to "whom a devise is made pursuant to an agreement made by "the testator for valuable consideration cannot be said to be "an object of the testator's bounty, and I cannot think that "the Family Protection Act was ever intended to defeat, nor "do I think it should be construed as defeating, obligations "incurred by a testator, or rights or equities acquired by "third parties by contract with the testator, in good faith "and for valuable consideration." As Smith J. in his dissenting judgment points out, if this was so, a young bachelor, who had agreed for a consideration to leave all his property by his last will to a relative, friend, or creditor, might later marry and leave his widow and children without any support in circumstances where the Act could not modify the distribution of the testamentary estate. The manifest purpose of the Family Protection Act, however, is to secure, on grounds of public policy, that a man who dies, leaving an estate which

(1) [1939] N. Z. L. R. 560.

he distributes by will, shall not be permitted to leave widow and children inadequately provided for, if the court in its discretion thinks that the distribution of the estate should be altered in their favour, even though the testator wishes by his will to bestow benefits on others, and even though he has framed his will as he contracted to do. The court, in considering how its discretion should be exercised, and how far it is just and necessary to modify the provisions of the will, will pay regard to the circumstances in which the testator's will is drawn as it is, and the interests of the respective members of the family, but, if the Court comes to the conclusion that no adequate provision has been made in the will, such as is called for by s. 33, then the jurisdiction of the court to alter the distribution of the estate in favour of the applicant (widow, widower, or children, as the case may be) cannot be doubted.

The Chief Justice, in his judgment, pointed out a difficulty which, in his view, would arise if the view above stated (which is also the view of the trial judge) were adopted. He says (1): "The effect of the decision appealed against is that where A. enters into a contract with B., for valuable consideration, that he will by his last will and testament devise certain lands to B., and A. subsequently marries and actually performs his contract, B. is to be in a worse position than if A. had committed a breach of his contract. It would be an extraordinary thing if our law permitted such a result." With the greatest respect to the learned Chief Justice, their Lordships do not think that this result would follow. Their Lordships do not question the binding authority of cases like *Hammersley* v. *De Biel* (2) and *Coverdale* v. *Eastwood* (3), but the actual result of applying such decisions in New Zealand may be affected by the provisions of the Family Protection Act. Under a system of law which gives to the court no jurisdiction to alter, to the detriment of B, the devise made by A in B's favour, the compensation due to B from A's estate, if A fails to fulfil his contract to make the devise, will be the value of that which B should have received under

(1) [1939] N. Z. L. R. 559.
(2) 12 Cl. & F. 45.
(3) (1872) L. R. 15 Eq. 121.

J. C.
1941
DILLON
v.
PUBLIC
TRUSTEE OF
NEW
ZEALAND.

the will. In New Zealand, however, this value is not necessarily the whole value of the interest which the testator agreed to devise, but is that value less the extent to which it would be reduced by a redistribution due to the application of the Family Protection Act. In other words, in accordance with the principle of the cases cited, the loss suffered by B from A's breach of contract is the equivalent of the benefit which B would have enjoyed if the contract had been performed. This benefit, owing to the provisions of the Family Protection Act, is not necessarily equivalent to an unconditional right to receive the devise in full, and the estimate of B's loss is proportionately reduced. Thus, B is in the same position, so far as compensation is concerned, if A breaks his contract as he would be if A had performed it. There may well be instances where all this is difficult to work out, but their Lordships cannot entertain any doubt that, in principle, the Family Protection Act affects the unqualified operation of a contract to make a will in a particular form, whether the contract is fulfilled or whether it is broken.

Their Lordships were unable to gather from the material brought before them, or from the statements of counsel, that any issue was discussed in argument before the Court of Appeal other than the question whether in the circumstances the court had jurisdiction to interfere with the terms of the will, and they have no right to assume that the trial judge, acting on the basis that he had such a discretion, did not make due allowance for the fact that the testator, in framing his will as he did, was fulfilling the terms of a contract entered into in his lifetime for good consideration. There is, moreover, no ground for thinking that he did not pay regard to the pecuniary position of the children, who were represented by counsel on the application before him. It would be manifestly undesirable that the net amount of this comparatively small estate should be reduced by further litigation, and their Lordships propose to put an end to the matter by adopting a variation suggested by Smith J. in the Court of Appeal (which the appellant before this Board offered to accept), namely, that the house, which under the will passes to the widow absolutely, is taken by her subject to liability for the mortgage, and not, as Northcroft J. decreed, freed from the mortgage. The widow's other income from the estate will remain as fixed by the trial judge, namely, an annuity which will make her total income drawn from the testator's estate up to 150*l.* a year as from the testator's death on the footing that the net sum paid to her out of the residuary estate will, as from its receipt, produce a return at the rate of three and a half per cent. a year.

The first respondent, the Public Trustee in and for the Dominion of New Zealand, was separately represented at the hearing before their Lordships, and applied for directions as to how the order ultimately made should be worked out. Under s. 33, sub-s. 4, of the Family Protection Act, 1908, the incidence of payments ordered is to fall rateably on the whole estate of the testator, unless the court otherwise determines. It appears to their Lordships that a special direction is needed in the present case. The payments ordered to be made to the appellant should be charged exclusively on the farming lands devised by the will in priority to, and without reducing, the annuity of 50*l.* in favour of Elsie Higgins. There should be a direction to the Public Trustee to execute a registered charge on the farming lands in favour of the appellant to secure, first, a sum equal to the arrears from the death of the testator to the time at which the residue is paid over to her, and the annuity to be paid to her as from that date which can only then be exactly ascertained. These directions would appear to be sufficient for the purpose, but if they need further amplification or adjustment, the matter can be dealt with by the court in New Zealand.

There remains the question of costs. The costs of the Public Trustee in this litigation as between solicitor and client must come out of the residue of the estate. The appellant's costs here and below must be paid by the other respondents.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, and that the order made by Northcroft J. should be restored, with the variation that

J. C.
1941
DILLON
v.
PUBLIC
TRUSTEE OF
NEW
ZEALAND.

the house is to be taken by the appellant subject to liability for the mortgage, while the appellant's other income from the estate will include the sum necessary to make up an annuity of 150*l.* a year in the manner more particularly described above. The costs of the Public Trustee in and for the Dominion of New Zealand as between solicitor and client will be paid out of the residue, and the appellant will have her costs here and below, which must be paid by the other respondents. There will be general liberty to apply to the court in New Zealand if any difficulty should arise in working out the order as so varied.

Solicitors for appellant: *Wray, Smith & Halford.*

Solicitors for respondents: *Ashurst, Morris, Crisp & Co.*

Solicitors for the Public Trustee of New Zealand: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

J. C.*
1941
April 3.

HOANI TE HEUHEU TUKINO . . APPELLANT;

AND

AOTEA DISTRICT MAORI LAND BOARD RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Native lands—Legislation imposing a charge—Constitutional validity—Enforcement of treaty rights—Principle applicable—Court bound by legislative enactments—Treaty of Waitangi, 1840, *arts.* 1, 2—*New Zealand Constitution Act,* 1852 (15 & 16 *Vict. c.* 72), *s.* 73—*Establishment and Government of Provinces in New Zealand Act,* 1862 (25 & 26 *Vict. c.* 48), *s.* 8—*Native Purposes Act,* 1935, *of N. Z., s.* 14.

In 1908 the predecessor of the respondent land board, as statutory agent of the native owners of certain lands in the North Island of New Zealand, entered into an agreement with T. company under which the company was (inter alia) to buy the timber on the lands, pay royalties in advance, and build a railway. T. company found difficulty in carrying out its obligations, and in 1914 and 1919 made agreements with E. company whereby it obtained assistance from that company, and at the same time statutory provisions were passed which provided that, in the event of default by T. company in its obligations to the respondent board (which had succeeded its predecessor), the rights and obligations of T. company under its agreement with E. company were to be transferred from T. company to the board. In 1930, owing to default by T. company, the board cancelled the agreement between them. E. company thereupon alleged that over 46,000*l.* was due to it from T. company and that the obligation to pay had been transferred from T. company to the board under the statutory provisions of 1914 and 1919. The legislature intervened, and in 1935, under the authority and by direction of s. 14 of the Native Purposes Act, 1935, the respondent board paid 23,500*l.* to E. company in settlement of its claim, and that amount was by the Act repayable by the native owners and charged on their lands. The appellant, representing the owners of the lands, contending that the board, as statutory agent of the native owners, had acted negligently and in breach of their duty in failing (inter alia) to obtain from the court directions as to the legal liability, if any, of the board or the native owners to E. company, and that, in consequence of that breach of duty s. 14 of the Act of 1935 had been enacted, claimed that the native owners and their lands should be indemnified by the board from and against the payment of the 23,500*l*. The appellant contended, alternatively, that s. 14 of the Act of 1935 was ultra vires the legislature of New Zealand in so much as it derogated from the rights conferred on the native owners by the Treaty of Waitangi, 1840 :—

**Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD WRIGHT, and LORD PORTER.

J. C.
1941
HOANI TE HEUHEU TUKINO *v.* AOTEA DISTRICT MAORI LAND BOARD.

Held, first, that it is not open to the court to go behind what has been enacted by the legislature and to inquire how an enactment has come to be made, whether it arose out of incorrect information or, indeed, actual deception by someone on whom reliance was placed by it. The court must accept the enactment as the law, and so could neither inquire whether the board had been guilty of the alleged breaches of duty nor whether the enactment of s. 14 of the Act of 1935 was the reasonable and natural consequence of those breaches.

Principle in *Labrador Company* v. *The Queen* [1893] A. C. 104, at 123, applied.

Held, secondly, that rights purporting to be conferred by a treaty of cession, such as the Treaty of Waitangi, could not be enforced in the courts, and that, therefore, so far as the appellant invoked the assistance of the court, he could not rest his claim on that treaty, but must rely on some statutory recognition of the right claimed by him.

Principle in *Vajesingji Joravarsingji* v. *Secretary of State for India* (1924) L. R. 51 I. A. 357, at 360, applied.

Held, lastly, that the New Zealand legislature, by virtue of s. 8 of the Establishment and Government of Provinces in New Zealand Act, 1862, an Imperial Act enabling the General Assembly to repeal s. 73 of the New Zealand Constitution Act, 1852, which recognized native rights in their lands, had received from the Imperial Parliament the power to legislate with regard to the native lands, and had the same power as the Imperial legislature had to alter and amend its legislation at any time, and, accordingly, had power to alter any right recognized or conferred by s. 73 of the Constitution Act of 1852. Sect. 14 of the Native Purposes Act, 1935, was, therefore, intra vires the New Zealand legislature.

Judgment of the Court of Appeal of New Zealand [1939] N. Z. L. R. 107, affirmed.

APPEAL (No. 95 of 1939), by special leave, from a judgment of the Court of Appeal of New Zealand (October 22, 1938) which affirmed a judgment of Smith J. (December 2, 1937).

In 1908 the Maniapoto-Tuwharetoa District Maori Land Board, the predecessors of the respondents, the Aotea District Maori Land Board, as authorized by s. 37 of the Maori Land Laws Amendment Act, 1908, on behalf of the Ngatituwharetoa, a Maori tribe owning timber-bearing lands in the North Island, entered into an agreement with the Tongariro Timber

J. C.
1941
Hoani Te Heuheu Tukino v. Aotea District Maori Land Board.

Company, Ld., under which the company was to buy the timber on the lands and pay royalties in advance on account thereof, and was also to build a railway for a distance of about 40 miles through the lands within certain prescribed periods. The Tongariro company subsequently found difficulty in carrying out its obligations, and in 1914 and 1919 it made agreements with the Egmont Box Company, Ld., under which it obtained assistance from the Egmont company. At the same time statutory provisions were passed which provided that, in the event of default by the Tongariro company in its obligations to the respondent board, the rights and obligations of the Tongariro company under its agreements with the Egmont company were to be transferred from the Tongariro company to the board. In 1930, owing to the defaults of the Tongariro company, the board cancelled the agreement between them, and the Egmont company thereupon alleged that a sum of over 46,000*l.* was due to it from the Tongariro company, and that the obligation to pay had been transferred from the Tongariro company to the board under the statutory provisions of 1914 and 1919. Negotiations took place between the board and the Egmont company, but without success, and in 1935 the board, under the authority and by the direction of s. 14 of the Native Purposes Act, 1935, paid 23,500*l.* to the Egmont company in settlement of its claim, that amount being by the statute repayable to the board by the native owners and charged on their lands. The appellant, chief of the Ngatituwharetoa, on behalf of the tribe and as representing the owners of the lands, claimed in the action out of which this appeal arose that (inter alia) the native owners and their lands should be indemnified by the board from and against the payment of the 23,500*l.* The appellant contended that the board, as the statutory agent of the native owners, owed a duty to them to safeguard their interests, that the board had acted in breach of that duty in failing (inter alia) to obtain from the court directions as to the legal liability, if any, of the board and/or the native owners to the Egmont company, and that, in consequence of that breach of duty, s. 14 of the Act of 1935 had been enacted, which authorized the payment of the 23,500*l*. The appellant contended, alternatively, that s. 14 of the Act of 1935 was ultra vires the legislature of New Zealand inasmuch as it derogated from the rights conferred on the native owners by the Treaty of Waitangi. The respondent board denied that they had been guilty of any negligence or breach of duty, and pleaded that in making the payment they had acted under compulsion of law and within the powers conferred on them by s. 14 of the Native Purposes Act, 1935. The terms of the relevant statutory provisions appear from the judgment of the Judicial Committee.

The Supreme Court of New Zealand (Smith J.) held that the basic answer to the claim was that the board was not under a legal liability by reason of doing an act which it was directed to do by an Act of Parliament, and he dismissed the claim. An appeal to the Court of Appeal (Myers C.J., Callan and Northcroft JJ.) (1) was dismissed, the court holding that s. 14 of the Act of 1935 was valid, and that it afforded an answer to the claim.

1940. Nov. 11, 14, 15, 18, 19 and 22. *M. H. Hampson* (of the New Zealand Bar), *H. L. Parker* and *James Christie* for the appellant. The appellant is not claiming against the board for doing what it was ordered to do by the Native Purposes Act, 1935, s. 14, but for failing to take such steps as would have defined the legal liabilities of the parties and made the true position clear to the Native Minister and the legislature before that Act was passed. Had the board fulfilled its duty in that respect no such Act as that of 1935 would ever have been passed, and no liability would have been imposed on the native owners. The contentions based on the Treaty of Waitangi are: (i.) The treaty is a solemn compact between Great Britain and the Maori people, under which they surrendered sovereignty, and it defines the right given to them; (ii.) the right acquired by the treaty is cognizable in the courts; (iii.) the New Zealand Constitution Act, 1852, declared that the Maori people had that right: ss. 53, 72 and 73; (iv.) the Colonial Laws Validity Act, 1865,

(1) [1939] N. Z. L. R. 107.

preserves that right, and makes New Zealand legislation in derogation of it ultra vires; (v.) the New Zealand Constitution (Amendment) Act, 1857, does not authorize the New Zealand Parliament to legislate in derogation of the treaty right; (vi.) New Zealand legislation has recognized and adopted the treaty as municipal law; and (vii.) s. 14 of the Native Purposes Act, 1935, derogates from the treaty right. The treaty has been considered in a number of cases. In *Reg.* v. *Symonds* (1) it is pointed out that the native title was guaranteed by the treaty, was entitled to respect, and that extinguishment must be by the Crown. In *Wi Parata* v. *Bishop of Wellington* (2) there were four points: (*a*) the Treaty of Waitangi was a nullity so far as cession by the natives of sovereignty was concerned; (*b*) transactions for cession with natives were acts of state not examinable by any court; (*c*) any act of the Crown declaring, or merely assuming, extinguishment of native title is conclusive and binding on the courts for all purposes; and (*d*) there was no customary law of Maoris of which the court could take cognizance. It is submitted that *Reg.* v. *Symonds* (1) is not an authority for any one of those four propositions. In *Nireaha Tamaki* v. *Baker* (3) the Privy Council said that the court is bound to recognize the fact of rightful possession and occupation by the natives until their title is lawfully extinguished. Then in *Wallis* v. *Solicitor-General for New Zealand* (4) it was decided that at the important date, 1848, any question of the rights of the natives was to be determined solely under the Treaty of Waitangi. [Reference was also made to *Waipapakura* v. *Hempton* (5), and *Hill* v. *Regem* (6).] There is in the reference to the title of the natives in s. 72 of the New Zealand Constitution Act, 1852, a recognition by the Imperial Government of an existing right or title, and that title, it is submitted, relates back to, and was given by, the Treaty of Waitangi.

---

(1) Parliamentary Papers Relative to the Affairs of New Zealand, Dec., 1847, p. 67.

(2) (1877) 3 N. Z. J. R. (N. S.) S. C. 72.

(3) [1901] A. C. 561, 567, 577.

(4) [1903] A. C. 173, 179.

(5) (1914) 33 N. Z. L. R. 1065, 1070–71.

(6) (1913) 33 N. Z. L. R. 313, 321, 343, 347.

J. C.
1941
HOANI TE HEUHEU TUKINO
v.
AOTEA DISTRICT MAORI LAND BOARD.

On the question whether or not the Maori treaty rights are cognizable in the municipal courts: If it should be held that the recognition of rights in a treaty does not give a title to enforce those rights, then it may be pointed out that the underlying principle on which that proposition of law rests is that a treaty is between two ruling sovereigns, and any question of rights under the treaty must be a matter of diplomatic negotiation. In the present case, however, there was a surrender of sovereignty, and there is no other case in the British Empire in which a treaty has been made by the sovereign with another ruling sovereign where there has been a surrender of sovereignty in return for a right. In not one of the instances mentioned in Halsbury's Laws of England, 2nd ed., vol. xi., p. 11, para. 12, was there a treaty of cession in which sovereignty was surrendered for a right. Even if the Treaty of Waitangi has never been made part of the municipal law of New Zealand—and it is submitted that the rights conferred by the treaty have become part of that law—it was freely negotiated between two sovereign peoples and the rights conferred on one of the parties thereto cannot be removed or curtailed by any municipal act of the New Zealand legislature. The Land Court in *In re Omapere Lake* (1) took the view that the treaty itself confers rights. In the present case the court below held that rights could only be ascertained by a consideration of statutes. In 1840 it was the intention of the Crown to give to the Maoris a guaranteed treaty right—a right based on the highest possible form of law, namely, a treaty, a solemn compact on which they could rely—and the New Zealand Constitution Act, 1852, did not take that right away. Sect. 72 of that Act declares the title of the natives and there is nothing in s. 53 which gives the New Zealand parliament the right to legislate in derogation of that right: Keith's Responsible Government in the Dominions, 2nd ed., vol. ii., pp. 751, 758 and 789–90. The Constitution (Amendment) Act, 1857, gave to the New Zealand parliament power to amend s. 72 of the Constitution Act, 1852, but it neither expressly nor impliedly empowered

---

(1) Aug. 1, 1929.

J. C.
1941
HOANI TE HEUHEU TUKINO
v.
AOTEA DISTRICT MAORI LAND BOARD.

that legislature to legislate in derogation of the treaty right. The effect of s. 73 of the Act of 1852 was to make the right conferred on the natives by the treaty part of the municipal law of New Zealand. With regard to the Colonial Laws Validity Act, 1865, which provides that no law passed by the Assembly is invalid unless it is repugnant to an Imperial Act extending to the Dominion, the argument is twofold: (i.) that s. 72 of the Constitution Act, 1852, incorporates the treaty right as part of the statute law of England, being a declaration by the Imperial Parliament that there was a treaty right, and any alteration, suspension or repeal of s. 72 by the New Zealand legislature which derogated from the rights of the Maori people conferred thereby would be ultra vires and void; but (ii.) if that be wrong, the treaty is still an order of England having in the Dominion the force and effect of an Act. The question whether the Statute of Westminster, 1931, gives power to the Dominion legislature to break the treaty does not arise because the Statute of Westminster has not been adopted by New Zealand. As a result of the Treaty of Waitangi and the provisions of s. 72 of the Constitution Act, 1852, native land can only be removed from native ownership by voluntary cession by its owners, and s. 14 of the Native Purposes Act, 1935, which imposed the charge on the Ngatituwharetoa lands was, therefore, ultra vires and void. It is true that a court cannot go behind an Act of Parliament and inquire how the enactment came to be made, but if it is found that somebody has deceived Parliament, those persons can be sued: *Labrador Company* v. *The Queen* (1).

[Their Lordships intimated that they did not think that that point could be usefully continued.]

H. L. Parker following, referred to a number of New Zealand statutes to show that for 95 years there had been a consistent policy in protecting the natives and giving them to the full the rights which it was contemplated they should get under the Treaty of Waitangi. The treaty was handed down as a sacred trust, and the powers given by the Constitution Act,

---

(1) [1893] A. C. 104, 123

1852, were all subject to that intention. [Reference was made to *Secretary of State for India* v. *Bai Rajbai* (1), *Vajesinji Joravarsingji* v. *Secretary of State for India* (2), and *Sammut* v. *Strickland* (3).]

Denning K.C. and *J. Pennycuick* for the respondent board, were required to deal only with the constitutional question whether s. 14 of the Native Purposes Act, 1935, was ultra vires the New Zealand legislature. The position in the type of cession effected by the Treaty of Waitangi is familiar in the British Empire. The radical title is transferred to the Crown, while the usufructuary right remains with the natives. By art. 1 of the treaty all rights of sovereignty were ceded absolutely. Art. 2 guarantees the rights of the natives. A treaty must be construed in the light of the circumstances, and, on its true construction, art. 2 is a statement of the Sovereign to the effect that what the natives have enjoyed de facto they will be considered de jure entitled to, subject to this, that they have no right to dispose of their lands except to the Crown. That article is no limitation on the Sovereign's right to legislate. If it were, it would mean that in one important sphere—legislation for public works involving the compulsory acquisition of land for roads, railways, etc.—nobody would have any rights to legislate, since the chiefs no longer have any sovereignty. No limitation can be placed on sovereignty except by express words. [Reference was made to McNair's Law of Treaties (1938), pp. 211–14; Hall's International Law, 8th ed., p. 394; and the Award of the Permanent Court of the Hague, reported in The American Journal of International Law, vol. iv., p. 956, which gave the answer to the argument for Great Britain in the North Atlantic Coast Fisheries Arbitration.] The interpretation put on the cession in *Amodu Tijani* v. *Secretary, Southern Nigeria* (4) is really the same as is to be found in the express terms in the present case. The course of legislation in New Zealand conforms to the interpretation now submitted,

(1) (1915) L. R. 42 I. A. 229, 237.
(2) (1924) L. R. 51 I. A. 357, 360–1.
(3) [1938] A. C. 678, 701.
(4) [1921] 2 A. C. 399, 402, 404, 407.

namely, that art. 2 of the treaty does not in any way limit the right to legislate which is inherent in art. 1. [Reference was made to a number of New Zealand Acts, such as public works Acts, which, it was contended, would contravene what the appellant suggested was the right construction of the treaty.] Dicey's Law of the Constitution, 9th ed., pp. 103-4, takes New Zealand as a typical case, saying that in its sphere it is sovereign. Nothing in the Indian Appeals cases which were cited in any way derogates from the right of the sovereign to legislate: *Vajesingji Joravarsingji* v. *Secretary of State for India* (1). *Sammut* v. *Strickland* (2) carries the matter no further. With regard to the New Zealand Constitution Act, 1852, the Dominion legislature were empowered to repeal s. 73 of that Act by the Imperial Act of 1862, and s. 73 was in fact expressly repealed by s. 4 of the Native Land Act, 1873, of New Zealand. Further, as was said by the Chief Justice in the Court of Appeal, in 1908 there was a cession by the natives of certain of their rights in the lands, and the subsequent legislation was simply an adjustment of difficulties arising out of the cession and did not contravene the treaty. Sect. 14 of the Native Purposes Act, 1935, is not contrary to the New Zealand Constitution Acts or to the Treaty of Waitangi. The treaty has not been made part of the municipal law. It is impossible to go behind the action of the legislature. The respondent board were not guilty of any breach of duty or negligence. They acted under the authority and direction of s. 14 of the Act of 1935. No action lies against them for so doing, and none would lie even if the legislation was shown to have resulted from breach of duty or negligence on the part of the board. [Reference was also made to *Cook* v. *Sprigg* (3), *Civilian War Claimants Association* v. *The King* (4), and *Attorney-General for Canada* v. *Attorney-General for Ontario* (5).]

Hampson in reply. Apart altogether from the Colonial Laws Validity Act, 1865, at the time of the Constitution Act,

---

(1) L. R. 51 I. A. 357, 360.
(2) [1938] A. C. 678.
(3) [1899] A. C. 572.
(4) [1932] A. C. 14.
(5) [1937] A. C. 326, 347.

1852, the New Zealand legislature was limited in its powers in that it could only pass laws that were not repugnant to the law of England. That position still exists, because s. 53 of the Act of 1852 is still operative.

1941. April 3. The judgment of their Lordships was delivered by VISCOUNT SIMON L.C. This is an appeal from an order and judgment of the Court of Appeal of New Zealand, dated October 22, 1938, which dismissed an appeal from the judgment of the Supreme Court of New Zealand (Smith J.), dated December 2, 1937, whereby judgment was entered for the defendant, the present respondent board.

The appellant is the chief of the Ngatituwharetoa, a Maori tribe, whose members own lands in New Zealand which were charged by virtue of s. 14 of the Native Purposes Act, 1935, with repayment to the respondent board of a sum of 23,500*l.* which had been paid by the latter in terms of the said section to the Egmont Company, Ld. The appellant instituted the present proceedings on behalf of the tribe and as representing the owners of the lands against the respondent board in the Supreme Court of New Zealand.

Sect. 14 of the Native Purposes Act, 1935, which replaced a substantially similar provision in s. 10 of the New Zealand Finance Act, 1934–1935, so far as here material, provided as follows :—"(1.) The Aotea District Maori Land Board (hereinafter in this section referred to as the board) is hereby "authorized, empowered, and directed to accept the offer of "the Egmont Box Company, Limited, to release and discharge "the board and the Native owners from all claims and demands "of whatever kind arising out of a certain agreement made "between the Tongariro Timber Company, Limited, and the "said Egmont Box Company, Limited, dated October 23, "1919 (including all amounts which the said Egmont Box "Company, Limited, claims to be entitled to set off against "royalties payable), in respect of timber-cutting and other "rights on the lands known and described in the said agreement "as Western Divisions A and B, in consideration of a sum "approved by the Native Minister to be paid to the said

J. C.
1941
HOANI TE HEUHEU TUKINO *v.* AOTEA DISTRICT MAORI LAND BOARD.

"Egmont Box Company, Limited, by the board. (2.) (*a*) The "sum approved by the Native Minister, together with all "costs and expenses incurred by the board in connection with "its negotiations with the Egmont Box Company, Limited, "and incidental hereto, shall be paid by the board out of "moneys in its account, and shall be deemed to be a loan to "the owners, including the Crown, of the whole of the lands "described and referred to in a certain deed of agreement "bearing date December 23, 1908, and made between the "Maniapoto-Tuwharetoa District Maori Land Board of the "one part and the Tongariro Timber Company, Limited, of "the other part, such deed being the deed entered into in "pursuance of the provisions of s. 37 of the Maori Land Laws "Amendment Act, 1908, excepting always, however, from "such lands all such portions thereof as have been actually "transferred to the Tongariro Timber Company, Limited, "for an estate in fee-simple. (*b*) Upon payment of such sum "as aforesaid the board shall by virtue of this Act and as "security for the repayment of such sum together with the "other moneys mentioned in paragraph (*a*) hereof (all herein-"after in this section referred to as the loan-moneys) and "together with interest thereon as hereinafter mentioned, "be deemed to have a charge upon all the lands and the revenue "therefrom referred to in paragraph (*a*) hereof, excepting any "of such land or any interest therein acquired or owned by "the Crown. . . . . (8.) The board shall be entitled to charge "and be paid interest at a rate not exceeding 5*l*. per cent. per "annum on the said loan-moneys until repayment thereof, "such interest to be charged as from the respective dates each "or any portion of such loan-money is paid out. (9.) The "expenditure hereby authorized shall be deemed to be a "proper investment by the board of its funds and such invest-"ment is hereby approved. (10.) Upon payment to the "Egmont Box Company, Limited, of the said sum, the "agreement between the Tongariro Timber Company, Limited, "and the Egmont Box Company, Limited, dated October 23, "1919, shall be deemed to be determined and cancelled, and "any right, title or interest acquired thereunder by the Egmont

"Box Company, Limited, shall pass to and vest in the board. "(II.) Upon payment of the said sum to the Egmont Box "Company, Limited, all moneys due and owing by the Tongariro "Timber Company, Limited, to the Egmont Box Company, "Limited, upon any account whatsoever, including moneys "which the Egmont Box Company, Limited, has paid or may "hereafter pay in respect of its liability as guarantor under "debentures issued by the Tongariro Timber Company, Limited, "for 26,000*l.* shall be deemed to be due and owing by the Tongariro Company, Limited, to the board, and the Egmont Box "Company, Limited, shall, at the cost of the board, assign to it "all securities it may hold for the payment of any such moneys."

In accordance with these provisions the Egmont Company made an offer to accept the sum of 23,500*l.*, and the Native Minister approved this amount, and directed the respondent board to pay it, which they did on June 25, 1935, and that sum thereupon became a charge upon the lands referred to in the agreement of 1908, other than those owned by the Crown, as provided by sub-s. 2 of s. 14. Thereafter, the present proceedings were instituted by the appellant, and, as was clearly stated by his counsel, to whom their Lordships are indebted for a full and able argument, the whole purpose of the proceedings is to obviate the statutory charge imposed on the lands of the native owners by the Act of 1935, and it is sought to attain that end by one of the two alternative contentions maintained before the Board. Counsel also stated that the native owners took the view that the Act of 1935 imposed a liability to the Egmont company for which there was no justification, and their Lordships note that Smith J., who tried the case, says in his judgment (1), "Although "I do not think there is any doubt about the legal position, "counsel for the defendant agreed with counsel for the plaintiff "that the Natives represented by the plaintiff had cause to "feel a sense of injustice." However, it is not within the province of this Board to criticize the policy of the legislature. The Board's duty is to construe and apply the enactments made by the legislature.

(1) [1939] N. Z. L. R. 112.

J. C.
1941
HOANI
TE HEUHEU
TUKINO
v.
AOTEA
DISTRICT
MAORI
LAND
BOARD.

The first contention submitted by the appellant was that relied on in the statement of claim in its final amended form, dated July 2, 1937, namely, that the respondent board, as the statutory agent of the native owners, owed a duty to them to safeguard their interests, that the board had acted in breach of that duty, and that, in consequence of that breach of duty, s. 14 of the Act of 1935 had been enacted. The appellant asked for the appropriate declarations, and for an order requiring the respondent board to indemnify the native owners and their lands from and against the payment of the sum of 23,500*l.* which the board had paid to the Egmont company, or any part thereof. The alternative contention of the appellant challenged the validity of the charge imposed by s. 14 of the Act of 1935, on the ground that such legislation was ultra vires the legislature of New Zealand, inasmuch as it derogated from the rights conferred on the native owners by the Treaty of Waitangi. This contention was not raised in the pleadings or before the Supreme Court, but it was heard and decided by the Court of Appeal, without objection. On the suggestion of their Lordships, counsel for the appellant has submitted an amendment to the prayer in the statement of claim in the following terms:—"(2.) (*a*) For a further "declaration by the Honourable Court that so much of s. 14 "of the Native Purposes Act, 1935, as imposes a charge on the "lands of the natives is ultra vires the legislature of New "Zealand." Counsel for the respondent board assents to the making of the amendment, and the scope of the argument presented before their Lordships is regularized by its allowance.

Before dealing with these contentions it will be convenient to give a brief outline of the events which led up to the Act of 1935. In 1908 the Maniapoto-Tuwharetoa District Maori Land Board—the predecessors of the respondent board—as authorized by s. 37 of the Maori Land Laws Amendment Act, 1908, on behalf of the native owners of the lands in question, entered into an agreement with the Tongariro Timber Company, Ld., under which the company was to buy the timber on the lands and pay royalties in advance

J. C.
1941
HOANI TE HEUHEU TUKINO
v.
AOTEA DISTRICT MAORI LAND BOARD.

on account thereof, and was also to build a railway for a distance of about 40 miles through the lands within certain prescribed periods. The Tongariro company subsequently found difficulty in carrying out its obligations, and in 1914 and 1919 it made agreements with the Egmont Box Company, Ld., under which it obtained assistance from the Egmont company. At the same time statutory provisions were passed, which provided that in the event of default by the Tongariro company in its obligations to the respondent board, the rights and obligations of the Tongariro company under its agreements with the Egmont company were to be transferred from the Tongariro company to the board. In 1930, owing to the defaults of the Tongariro company, the board cancelled the agreement between them, and questions then arose between the board and the Egmont company, the latter claiming that the Tongariro company was indebted to it in an amount exceeding 46,000*l.*, and that the liability had been transferred to the board under the statutory provisions of 1914 and 1919. In the hopes that a solution might be provided by negotiation, s. 18 of the Native Land Amendment and Native Land Claims Adjustment Act, 1930, provided (inter alia) that the respondent board should be authorized to enter into a new contract with the Egmont company incorporating such terms of the 1919 agreement as should be mutually agreed upon, with such additional terms as should, in the opinion of the respondent board, subject to the approval of the Native Minister, be fair, reasonable and equitable. If any dispute were to arise as to the terms to be included in the new agreement, the decision of the Native Minister was to be final, provided that, if the Egmont company were dissatisfied with the Native Minister's decision, it could decline to execute the proposed contract, and the parties were thereupon to be left to their respective rights and obligations under the agreement of 1919. It was further provided that, if no new contract was entered into under the Act, the respondent board should remain the statutory agent of the native owners with as full authority to act as if it were the legal owner of the premises.

No new agreement was arrived at or executed, and thereupon

J. C.
1941
HOANI TE HEUHEU TUKINO
v.
AOTEA DISTRICT MAORI LAND BOARD.

s. 10 of the Finance Act, 1934–1935, was passed, which was shortly thereafter superseded by s. 14 of the Act of 1935, and the statutory charge on the lands followed, against which the appellant seeks to be indemnified by the respondent board. In his statement of claim the appellant embodies his allegation of breach of duty by the respondent board as the statutory agent of the native owners in his prayer: "(1.) for "a declaration by this Honourable Court that the defendant "board's failure—(*a*) to obtain from this Honourable Court "directions as to the legal liability (if any) of the defendant "board and/or the native owners aforesaid to the Egmont "Box Company Limited; or in the alternative:—(*b*) to "terminate the contract of the Egmont Box Company Limited, "and sue for damages—was negligence and/or breach of duty. "(2.) For a further declaration by this Honourable Court that "the defendant board's failure to represent to the Crown "that it would be wrong to make any settlement with the "Egmont Box Company Limited which involved the payment "of moneys to be charged on the aforesaid lands until the "liability of the native owners for any of such moneys had "first been determined by this Honourable Court, was negligence "and/or breach of duty."

Their Lordships fully agree with the opinion of the Court of Appeal on this contention of the appellant. It is not open to the court to go behind what has been enacted by the legislature, and to inquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by someone on whom reliance was placed by it. The court must accept the enactment as the law unless and until the legislature itself alters such enactment, on being persuaded of its error. The principle laid down in *Labrador Company* v. *The Queen* (1), referred to by the Court of Appeal, is directly applicable. Lord Hannen, in delivering the judgment of the Board, states (2):—"This is an absolute "statement by the legislature that there was a seigneurie of "Mingan. Even if it could be proved that the legislature "was deceived, it would not be competent for a court of

---

(1) [1893] A. C. 104.

(2) Ibid. 123.

J. C.
1941
Hoani Te Heuheu Tukino v. Aotea District Maori Land Board.

"law to disregard its enactments. If a mistake has been "made, the legislature alone can correct it. The Act of "Parliament has declared that there was a seigneurie of "Mingan, and that thenceforward its tenure shall be changed "into that of franc aleu roturier. The courts of law cannot "sit in judgment on the legislature, but must obey and give "effect to its determination." Before the court can accede to the appellant's claim for an indemnity against the charge imposed by s. 14 of the Act of 1935, the court will require not only to find that the respondent board owed to the native owners the duty alleged, and that it committed the breaches of that duty which are alleged, but also that the enactment of s. 14 was the reasonable and natural consequence of such breaches, and, even assuming the duty and breaches to have been established, the third and last essential step for the appellant's success would involve an inquiry by the court of the nature prohibited by the principle of *Labrador Co.* v. *The Queen* (1). The appellant, therefore, fails in his first contention.

While the appellant's first contention assumed the legislative validity of the statutory charge enacted by s. 14 of the Act of 1935, and sought a remedy by indemnification against the liability thus imposed, his alternative contention, which remains to be dealt with, challenges the power of the legislature of New Zealand to impose such a charge on the native lands. The appellant maintained (1.) that the Treaty of Waitangi was a solemn compact defining the rights given to the Maori people in respect of their lands; (2.) that the right thus acquired by the Maori people is cognizable in the courts; (3.) that that right was declared by the Imperial Act of 1852 (15 & 16 Vict. c. 72), which granted a representative constitution to New Zealand; (4.) that the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63) preserves the right; (5.) that the Imperial Act of 1857 (20 & 21 Vict. c. 53), which amended the above Act of 1852, did not authorize the parliament of New Zealand to legislate in derogation of a treaty right; and (6) that the legislature of New Zealand has recognized and adopted the treaty as part of the municipal law and s. 14 of the Act of

---

(1) [1893] A. C. 104.

1935 derogates from the right conferred by the second article of the treaty in so far as it imposes a charge on the native lands.

Art. II. of the Treaty of Waitangi, which was dated February 6, 1840, was as follows :—"Her Majesty the Queen "of England confirms and guarantees to the chiefs and tribes "of New Zealand, and to the respective families and individuals "thereof, the full exclusive and undisturbed possession of "their lands and estates, forests, fisheries and other properties "which they may collectively or individually possess, so long "as it is their wish and desire to retain the same in their "possession ; but the chiefs of the United Tribes and the "individual chiefs yield to Her Majesty the exclusive right "of pre-emption over such lands as the proprietors thereof "may be disposed to alienate, at such prices as may be agreed "upon between the respective proprietors and persons "appointed by Her Majesty to treat with them in that behalf." Under Art. I. there had been a complete cession of all the rights and powers of sovereignty of the chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law. The principle laid down in a series of decisions was summarized by Lord Dunedin, in delivering the judgment of this Board in the Gwalior case, *Vajesingji Joravarsingji* v. *Secretary of State for India* (1) in these words (2) : "When a territory "is acquired by a sovereign state for the first time that is an act "of state. It matters not how the acquisition has been "brought about. It may be by conquest, it may be by "cession following on treaty, it may be by occupation of "territory hitherto unoccupied by a recognised ruler. In all "cases the result is the same. Any inhabitant of the territory "can make good in the municipal courts established by the "new sovereign only such rights as that sovereign has, through "his officers, recognised. Such rights as he had under the "rule of predecessors avail him nothing. Nay more, even "if in a treaty of cession it is stipulated that certain inhabitants

(1) (1924) L. R. 51 I. A. 357.

(2) Ibid. 360.

"should enjoy certain rights, that does not give a title to "those inhabitants to enforce these stipulations in the "municipal courts. The right to enforce remains only with "the high contracting parties. This is made quite clear by "Lord Atkinson when, citing the Pongoland case of *Cook* v. "*Sprigg* (1) he says (2): 'It was held that the annexation "'of territory made an act of state and that any obligation "'assured under the treaty with the ceding state either to the "'sovereign or the individuals is not one which the municipal "'courts are authorised to enforce.'"

So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him. He, therefore, refers to the Imperial Act, the New Zealand Constitution Act, 1852, under which representative government was conferred on New Zealand by the creation of a legislative body called the General Assembly, the powers of which, so far as material to the present question, are provided for in ss. 53, 72 and 73 as follows :—"53. It shall be competent to the said General "Assembly (except and subject as hereinafter mentioned) "to make laws for the peace, order, and good government "of New Zealand, provided that no such laws be repugnant to the "law of England; . . . . 72. Subject to the provisions "herein contained, it shall be lawful for the said General "Assembly to make laws for regulating the sale, letting, "disposal, and occupation of the waste lands of the Crown in "New Zealand; and all lands wherein the title of natives "shall be distinguished as hereinafter mentioned, and all such "other lands as are described in an Act of the Session holden "in the tenth and eleventh years of Her Majesty, c. 112, to "promote colonization in New Zealand, and to authorize a "loan to the New Zealand Company, as demesne lands of "the Crown, shall be deemed and taken to be waste lands of "the Crown within the meaning of this Act: provided always, "that, subject to the said provisions, and until the said General "Assembly shall otherwise enact, it shall be lawful for Her

(1) [1899] A. C. 572.

(2) (1915) L. R. 42 I. A. 229, 237.

"Majesty to regulate such sale, letting, disposal, and occupation by instructions to be issued under the signet and Royal "sign manual. 73. It shall not be lawful for any person "other than Her Majesty, her heirs or successors, to purchase "or in anywise acquire or accept from the aboriginal natives "land of or belonging to or used or occupied by them in "common as tribes or communities, or to accept any release "or extinguishment of the rights of such aboriginal natives "in any such land as aforesaid; and no conveyance or transfer, "or agreement for the conveyance or transfer, of any such land, "either in perpetuity or for any term or period, either absolutely "or conditionally, and either in property or by way of lease "or occupancy, and no such release or extinguishment as "aforesaid, shall be of any validity or effect unless the same be "made to, or entered into with, and accepted by Her Majesty, "her heirs or successors: . . . ."

The appellant's contention was that the right conferred by the Waitangi Treaty was made a substantive part of the municipal law by s. 73 of this Act, but he had to concede that the Imperial Parliament, by virtue of its sovereign power of legislation, might have altered any right recognized or conferred by s. 73, by enacting a few months later a provision in the precise terms of s. 14 of the New Zealand Act of 1935. In view of this admission—which, in the opinion of their Lordships, was rightly made—the only ground left on which the appellant can challenge the validity of s. 14 is that the Imperial Parliament has not conferred on the New Zealand Legislature the power to alter s. 73 of the Act of 1852. But this ground also fails, since, while s. 73 of the Act of 1852 was expressly excepted from the power of alteration and repeal of the provisions of that Act conferred by the amending Act of 1857 (20 & 21 Vict. c. 53), the Imperial Parliament passed an Act in 1862 (25 & 26 Vict. c. 48), which enabled the Assembly to repeal s. 73 of the Act of 1852 and provided that no enactment of the Assembly should be invalid because of repugnancy to s. 73. If it were needed, the provisions of the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), operate to the same effect.

If then, as appears clear, the Imperial Parliament has conferred on the New Zealand legislature power to legislate with regard to the native lands, it necessarily follows that the New Zealand legislature has the same power as the Imperial Parliament had to alter and amend its legislation at any time. In fact, as pointed out by the learned Chief Justice, s. 73 of the Act of 1852 was repealed by the New Zealand legislature by the Native Land Act, 1873. As regards the appellant's argument that the New Zealand legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the native lands, and, in any event, even the statutory incorporation of the second article of the treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactments.

In the opinion of their Lordships, the appellant has failed to satisfy them that the enactment of the statutory charge in s. 14 of the Act of 1935 was beyond the competency of the New Zealand legislature, and the appeal fails on this point also. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, with costs, and that the order and judgment of the Court of Appeal of New Zealand should be affirmed.

Solicitors for appellant: *Coward, Chance & Co.*
Solicitors for respondent: *Biddle, Thorne, Welsford & Gait.*

Referred to. Tamlin v. Hannaford [1950] 1 K. B. 18

[PRIVY COUNCIL.]

J. C.*
1941
April 28.

INTERNATIONAL RAILWAY COMPANY . Appellant;

AND

NIAGARA PARKS COMMISSION. . . . Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Contract—Principal and agent—Agent liable as well as principal—Crown—Agent—Description—Interest—Payment —Possession of subject-matter before payment of purchase price.

In 1891, the predecessor in title of the appellant company entered into an agreement with the respondent commissioners, now known as the Niagara Parks Commission, a statutory corporation with express power to sue and be sued, by which the company were licensed to construct and operate an electric railway over and through lands owned by the commissioners. The agreement, which was made by the commissioners " on their " own behalf as well as on behalf of and with the approval of the " government of the province of Ontario," provided (inter alia) that at the end of a stipulated period the railway, together with equipment and machinery, should become the property of the commissioners, subject to the payment of compensation to be agreed on or awarded. The contract was approved and ratified by the legislature of Ontario, and declared to be " valid and " binding on the parties thereto." A sum having been awarded on appeal in arbitration proceedings as compensation to the company for the railway as a going concern when the commission took possession of it in accordance with the terms of the agreement of 1891, the company brought an action against the commission claiming to recover interest on the sum awarded for the period from the date on which possession was taken until payment of the sum awarded. The commission having contended that the commissioners had entered into the contract as agent of the Crown and that the company's only remedy was by petition of right:—

Held, that there is nothing to prevent an agent from entering into a contract on the basis that he is himself to be liable to perform it as well as his principal; that the commissioners, having entered into the agreement of 1891 " on their own behalf " as well as on behalf of the Crown, had done so on the express terms that they were to be liable for its fulfilment; and that the company's action was accordingly competent.

---

* *Present:* Lord Atkin, Lord Thankerton, Lord Romer, Clauson and Luxmoore L.JJ.

It is preferable, in the interests of clarity, that the words "agent or servant" of the Crown should be used rather than the phrase "emanation of the Crown" in describing such persons or bodies.

Dictum of Day J. in *Gilbert* v. *Corporation of Trinity House* (1886) 17 Q. B. D. 795, at 801, commented on.

In cases where courts of equity would grant specific performance, if the purchaser obtains possession of the subject-matter of the contract before the payment of the purchase price, he must, in the absence of express terms to the contrary, pay interest on his purchase money as from the date when he gets possession until the date of payment. This rule is not limited to cases of sale and purchase of land. The company was, therefore, entitled to recover the interest claimed by them.

Birch v. *Joy* (1852) 3 H. L. Cas. 565, referred to.

Toronto City Corporation v. *Toronto Railway Corporation* [1925] A. C. 177, followed.

Judgment of Court of Appeal for Ontario [1940] O. R. 33, reversed.

APPEAL (No. 23 of 1940) from a judgment of the Court of Appeal for Ontario (October 31, 1939) affirming a judgment of Kelly J. (July 24, 1939).

The following statement of the facts is taken from the judgment of the Board:

By an Act of the legislature of Ontario intituled "An Act "respecting the Niagara Falls Park" (Statutes of Ontario, 1887 (50 Vict. c. 13)) three persons therein named, who then constituted an unincorporated body known as the Board of Commissioners for Niagara Falls Park, with two other persons to be appointed by the Lieutenant-Governor in Council were incorporated under the title "The Commissioners for the "Queen Victoria Niagara Falls Park" to establish, maintain, improve, and develop certain lands selected by the commissioners thereby constituted as a public park, to be called "The Queen Victoria Niagara Falls Park." The lands referred to were approved by the lieutenant-governor, and were by the Act last mentioned vested in the commissioners as trustees for the province. The Act conferred on the commissioners the necessary powers enabling them to perform the duties thereby imposed on them, the majority of those powers being subject to the control of the lieutenant-governor in council. These included power to raise a limited sum of money by the issue of debentures charged on the revenues of the commissioners. It was expressly provided that the debentures so issued might be guaranteed by the Crown by Order in Council.

On December 4, 1891, an agreement was entered into between the Commissioners for the Queen Victoria Niagara Falls Park, who were therein expressed to be acting "on their "own behalf as well as on behalf of and with the approval of "the government of the province of Ontario" of the first part, and three gentlemen who were the promoters of the railway, the subject-matter of the agreement, and were with the company thereafter to be incorporated, therein called the company, of the second part. The agreement (hereinafter referred to as the agreement of 1891) contained recitals to the effect that the company desired to construct and operate an electric railway along the top of the west bank of the Niagara River; that the company intended to apply for a charter of incorporation to enable it to construct and operate the said railway and other works therein specified, and to execute effectively the engagements entered into therein on the part of the company; and that the company desired to secure the rights of way to construct the said railway through and in the Queen Victoria Niagara Falls Park, the property of the commissioners, and through and over other lands of the commissioners, and also through and over lands held or contracted for by the commissioners under contracts with and licences from the owners thereof respectively. By the operative part of the 1891 agreement (cl. 1) the commissioners licensed the company to construct an electric railway in and through what is described as "the park proper," and on and over other lands of the commissioners, some of which were defined as "the chain reserve." The phrase "the park "proper" was defined in the agreement to mean the Queen Victoria Niagara Falls Park. The agreement, by cl. 2, required that the company should construct, equip and operate the railway, and extend the same to Chippawa Creek, which was not within the limits of the park proper as defined by the agreement, with sufficient sidings and equipments to meet

J. C.
1941
INTERNATIONAL RY. Co.
v.
NIAGARA PARKS COMMISSION.

the development of traffic. By cl. 15 the company undertook to build the railway in every respect fit for traffic not later than September 1, 1892. By cl. 16 to cl. 19 inclusive the company's right to operate the railway was to begin on September 1, 1892, and was to extend to a period of forty years from that date, at an annual rental of $10,000, with an option to the company to extend the right for a further period of twenty years at an increased rental if demanded by the commissioners, to be fixed by arbitration if the parties should be unable to agree. By cl. 26 it was provided that, if at the end of the said period of forty years the company was unwilling to renew, or at the end of the further period of twenty years, if the company continued to hold for such further period, the company should be duly compensated by the commissioners for their railways, equipment, machinery and other works, but not in respect of any franchises for holding or operating the same, such compensation to be fixed by mutual agreement, or in case of difference, by arbitration as stated in the agreement, but the failure before the expiration of any such term to fix or pay the compensation was not to entitle the company to retain possession meanwhile of the said railways, equipment, machinery and works. Clause 29 was as follows: "Subject "always to the terms and provisions of this agreement, and "to the rights of the commissioners as the owners in fee simple "of land over which the right of way in the park proper and "on the chain reserve is granted, the said railways and their "equipment and the other works constructed or required under "this agreement, shall upon such construction or acquisition, as "the case may be, be vested in and shall be the property of "the company who shall, subject as aforesaid, be entitled "to operate, manage and control the same during the period "or periods respectively above mentioned, it being however "hereby declared, understood and agreed, that at the end of "the said first or second periods, as the case may be, the "whole of the company's said high level railway from Queenston to Chippawa, and the said low level railway, if then "held by the company under this agreement, together with "their equipment and the machinery and works aforesaid, "including the elevators or lifts acquired or built "and including also the works in Queenston and Chippawa "shall become the property of the commissioners, subject "to the payment of compensation to be agreed upon or "awarded as the case may be, and as is hereinbefore provided "for."

On April 14, 1892, the Act referred to in the 1891 agreement was passed by the legislature for Ontario. It is intituled "An Act to Incorporate the Niagara Falls Park and River "Railway Company (1892, 55 Vict. c. 96)." The preamble contains a recital to the effect that the Commissioners of the Queen Victoria Niagara Falls Park, acting on their own behalf as well as on behalf and with the approval of the government of the Province of Ontario, on December 4, 1891, entered into the above mentioned agreement which is set out in Sch. B to the Act. By s. 1 of this Act the agreement was approved and ratified, and declared to be valid and binding on the parties thereto, each of whom was thereby authorized and empowered to do whatever was necessary to give effect to the substance and intention of the agreement, and was thereby declared to have had power to do all acts necessary to give effect to it. By s. 2 the Niagara Falls Park and River Railway Company, being the company referred to in the agreement, was incorporated, and by subsequent sections the necessary powers were conferred on this company to enable it to carry into effect the agreement, including such powers as were necessary for the construction and operation of the railway, the purchase of lands for any of the company's purposes, and the sale and conveyance of surplus lands.

The company incorporated by this Act duly acquired the necessary lands and built the railway. Subsequently, the railway so constructed and the lands so acquired, together with all rights and liabilities of the said company, became vested in the appellant company.

By a further Act of the legislature for Ontario, passed in 1927 (R. S. O. 1927, c. 24, s. 3), it was provided that the body corporate theretofore constituted by the name of the

"Commissioners for the Queen Victoria Falls Park" should be continued, and should thereafter be known as the "Niagara "Parks Commission," and it was by this name that the corporation was sued by the appellant company.

The railway constructed under the agreement and the Act of 1892 was operated by the appellant company and its predecessor in title for 40 years from September 1, 1892. The option to extend its operation for a further twenty years was not exercised by the appellant company, and the period of operation accordingly expired on September 1, 1932, but by agreement with the commission the actual operation by the appellant company did not cease until September 12, 1932. The appellant company notified the commission before September 1, 1932, of the fact that it did not desire to renew its franchise. The commission took possession of the railway pursuant to the terms of the agreement of 1891 on September 12, 1932. There was considerable delay in the appointment of arbitrators under cl. 29 thereof, and it was not until May 25, 1935, that the arbitrators appointed thereunder made their award, by a majority, fixing the compensation to be paid to the appellant company by the commission at the capital sum of $179,104. This sum was fixed on the basis of the scrap value of the component parts of the railway. The arbitrators did not deal with the question of interest because it had been decided by this Board in *Toronto City Corporation* v. *Toronto Railway Corporation* (1) that the question of interest did not fall to be dealt with in arbitration proceedings, but was a matter to be decided by the courts.

The appellant company appealed from the award of May 25, 1935, to the Court of Appeal for Ontario. On December 31, 1935, the award, with certain small variations, was affirmed by that court. A further appeal was made to His Majesty in Council, and on April 23, 1937, it was ordered that the appeal should be allowed and that the case should be remitted to the Court of Appeal for Ontario with a direction to pronounce an order that, among other things, the award of the majority arbitrators should be varied by fixing the compensation to

(1) [1925] A. C. 177.

J. C.
1941
INTERNATIONAL RY CO.
v.
NIAGARA PARKS COMMISSION.

be paid to the appellant company at $1,057,436. The Board held that there was no justification under the agreement or the Act of 1892, for assessing the compensation at scrap value. Lord Macmillan, who delivered the judgment of this Board, said: "This is fundamental—it is a railway complete "with equipment, machinery and works, which the company "was bound to hand over to the Parks Commissioners on "September 1, 1932, and not the components of a railway ". . . . It could not legally, if it had been possible in fact, "have dismantled the railway at the end of the 40 years, "and tendered the broken-up material to the Parks Commissioners in fulfilment of its obligation. That for which it is "to be duly compensated is the same thing as that which it "was bound to hand over, namely, its railway, with its equipment, machinery, and other works, a going concern, and "not a mere collection of materials." Lord Macmillan further said: "As the dissentient arbitrator states: 'a long line of "'cases has approved this [i.e., the principle of reconstruction "'cost, less depreciation] as a correct method of valuing a "'public utility where the value of the franchise is excluded "'from consideration.' It is said that the present is not a "case of compulsory acquisition, and that this circumstance "affects the nature of the compensation payable. The "company, it is said, is thankfully relinquishing a damnosa "hereditas. But again it has to be remembered that the "terms of transfer must be read as equally applicable to a "transfer of the railway in 1952, when the company's franchise "definitely expired, and also to a transfer in the height of "prosperity. If the company had been highly prosperous, "and had applied for, and obtained, an extension of its franchise to September, 1952, it would, on the arrival of that "date, have had compulsorily to relinquish, however "reluctantly, its profitable undertaking to the Parks Commissioners, and the same terms of transfer, construed in "the same way, would have been applicable." Further, the Board held, following the decision in *Toronto City Corporation* v. *Toronto Railway Corporation* (1), that the arbitrators had no power to deal with the question of interest, and that the appellant company must seek enforcement of that claim outside the arbitration.

---

(1) [1925] A. C. 177.

On August 29, 1938, the appellant company instituted an action in the Supreme Court of Ontario against the commission to recover $227,538.22, representing the unpaid balance of $251,322.08 claimed to be due in respect of interest at five per cent. per annum from September 1, 1932, to June 3, 1937, on a capital sum of $1,057,436. The action was heard by Kelly J., who dismissed it and ordered the appellant company to pay the costs. The appellant company appealed from that order to the Court of Appeal for Ontario. The appeal was heard by Riddell, McTague and Gillanders JJ.A., who dismissed it with costs. On December 19, 1939, McTague J.A., admitted an appeal by the appellant company to His Majesty in Council.

The trial judge dismissed the action of the appellant company on two grounds: first, that the appellant company was not entitled to any interest in respect of the capital sum, and, secondly, that, even if the company was entitled to interest, its only remedy was by petition of right against the Crown. The Court of Appeal for Ontario affirmed the decision of the trial judge on both grounds. [The judgment is reported at [1940] O.R. 33].

The company appealed, submitting before the Board that the decisions of the trial judge and the Court of Appeal for Ontario were wrong on both points.

1941. Feb. 20, 24, 25 and 26. *Pritt K.C.* and *Leonard Stone* for the appellant. There is no hint in the agreement of 1891 that it was made with the Crown. Except for the few words "as well as on behalf of and with the approval of the "government of the province of Ontario," it was an ordinary contract between two persons both being subject to the Crown and liable to litigation and to arbitration. By s. 7, sub-s. 3, of 50 Vict. c. 13 (an Act Respecting the Niagara Falls Park) the debentures which the commissioners might issue to raise money might be guaranteed by the Crown by Order in Council. The Crown cannot guarantee its own debt, so s. 7, sub-s. 3, is a way of saying that the commissioners were a separate body independent of the Crown. There are frequent indications to that effect in the legislation affecting this matter. The interpretation of "corporation" in force at the material time (the present Act is substantially the same) in fact made this incorporated body suable in the ordinary form: Interpretation Act, R. S. O. 1937, c. 1, s. 28. A body is either the Crown, or contracting as agent for the Crown, or it is not. If it is not, to call it an "emanation of "the Crown" just because it has a good many public functions does not carry the matter further. The only way in which the respondent commission can escape liability under the contract would be to show that the commissioners were contracting as agents for the Crown, and not so as to make themselves personally liable. To ascertain that, the contract itself, above all else, must be looked at. It is submitted that the provision therein that the commissioners are contracting "on their own behalf" as well as on behalf of the Crown, and the provisions in the statute confirming the contract and declaring that it is to bind the parties thereto, is really an end of the case: *Dunn* v. *McDonald* (1). The matter may be put in two ways: (1.) That the commissioners were contracting on their own behalf and making themselves personally liable even if they were acting for the Crown; (2.) that it is wrong to say, as the respondent contended below, that the commission is so clearly a Crown body, an alter ĕgo of the Crown, that it must be thought of in terms of the Crown. Canadian authority, and a certain amount of English authority, and a general view of the whole matter support the contention that the commissioners were not the Crown, nor the agents of the Crown, and that the Crown has deliberately elected to have a semi-public function carried out by creating a body to do it: *Gilbert* v. *Corporation of Trinity House* (2). [Counsel was stopped on this point.]

The contention that the company is entitled to interest on the compensation awarded is based on the law of

---

(1) [1897] 1 Q. B. 555, 556.

(2) 17 Q. B. D. 795, 799.

J. C.
1941
INTERNATIONAL RY. CO.
v.
NIAGARA PARKS COMMISSION.

Ontario as well as on the general principle of *Birch* v. *Joy* (1), to the effect that, if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase money, and if the purchase money is retained by him, it will carry interest to be paid by him to the seller. In Ontario the matter is regulated by s. 33 of the Judicature Act, R. S. O., c. 100, which provides that "Interest shall be payable in all cases in "which it is now payable by law and in which it has been "usual for a jury to allow it." While the main argument on behalf of the company is based on the general principle, there are some authorities in Ontario dealing with s. 33 of the Judicature Act which show that it may be that one is entitled to interest in Ontario even if not so entitled in England on the general principle: *Toronto Railway* v. *Toronto City Corporation* (2). The compensation contemplated by the contract was to be paid on September 1, 1932, and the company ought not to be penalized because it was not. Without doubt the equitable principle in *Birch* v. *Joy* (1) is part of the law of Ontario. The principle also applies to cases of compulsory purchase: *Rhys* v. *Dare Valley Railway Co.* (3). It is submitted that there was in truth in the present case a sale by the company to the commission of the whole enterprise and that it would fall within the doctrine of *Birch* v. *Joy* (1). [Reference was also made to *In re Pigott and the Great Western Railway Co.* (4).] *Fletcher* v. *Lancashire and Yorkshire Railway* (5) goes a long way towards showing that it is not a question whether the company could have obtained any enjoyment from the undertaking had they retained possession of it until payment. If the commission have had the enjoyment of it, they must pay interest on the purchase price until payment. In *Toronto City Corporation* v. *Toronto Railway Corporation* (6) the contract and statute were close to those in the present case. The matter of interest also came up for consideration in the Ontario Courts in *City of Toronto* v. *Toronto Railway Co.* (7). The contract in the present case was not in respect of a mere sale of chattels, still less was it a mere contract to manufacture a railway for someone else and deliver it to them on a specified date. It was a contract under which the company owned a good deal of real property which was to be taken over and compensated for at the end of the franchise period. It really was a sale of something which was land or very like land: *Inglewood Pulp and Paper Co.* v. *New Brunswick Electric Power Commission* (1); *Niagara Falls Park and River Railway Co.* v. *Niagara* (*Municipality of*) (2); *Queen Victoria Niagara Falls Park Commission* v. *International Railway Co.* (3); *and Gas Consumers Co. of Toronto* v. *City of Toronto* (4). *Metropolitan Railway Co.* v. *Fowler* (5) is of assistance by way of analogy to show that, even if there be only an easement of right of way, still it should be regarded as an interest in land. It is sought to put the case higher than easement, though it is submitted that easement is enough. The relation of vendor and purchaser existed between the parties. The interest claimed is interest on purchase money and by the equitable principle it was payable from the time when possession of the property purchased was taken by the purchaser.

---

(1) 3 H. L. Cas. 565.
(2) [1906] A. C. 117.
(3) (1874) L. R. 19 Eq. 93, 95.
(4) (1881) 18 Ch. D. 146, 149, 152-3.
(5) [1902] 1 Ch. 901, 908.
(6) [1925] A. C. 177, 193.
(7) (1926) 59 O. R. 73.

Leonard Stone following. Whenever a purchaser gets the benefit of the subject-matter of the contract he must pay interest from the time he takes possession until payment of the purchase price, and that principle is not confined to contracts which are exclusively for the sale and purchase of land. There are a number of earlier authorities, dealing with various subject-matters, in which interest has been ordered to be paid in accordance with that principle: *Ex parte Manning* (6); *Twigg* v. *Fifield* (7); *Dakin* v. *Cope* (8); *Fludyer* v. *Cocker* (9); and *Attorney-General* v. *Christchurch* (10). [Reference was also made to Sugden's Vendors and Purchasers, 14th ed., p. 631.] The crucial date in the present case was September 1, 1932. The subject-matter of the contract here includes an interest

---

(1) [1928] A. C. 492, 498.
(2) (1900) 31 O. R. 29, 34.
(3) (1928) 63 O. L. R. 49.
(4) (1897) 27 S. C. R. (Can.) 453.
(5) [1893] A. C. 416.
(6) (1727) 2 P. Wms. 410.
(7) (1807) 13 Ves. Jun. 517.
(8) (1827) 2 Russ. 170.
(9) (1805) 12 Ves. 25.
(10) (1842) 13 Simons 214.

J. C.
1941
INTERNATIONAL RY. CO.
v.
NIAGARA PARKS COMMISSION.

in land, although it may not be necessary to define exactly what that interest is, because, at any rate, it is a contract in respect of which specific performance would be granted. Once one arrives at that stage the equitable doctrine applies and interest is payable on the price of the railway as a going concern.

Le Quesne K.C. and *Frank Gahan* for the respondent commission. The courts below were right in dismissing the action on the ground that it was incompetent as not brought in the proper form. What the courts below have really done is to look at the substance of the matter and come to the conclusion that the commissioners were nothing more than an instrument of the Crown in all that they did, and were incapable of acting in any but a representative capacity. That is the right view. The more the Queen Victoria Niagara Falls Park Act, 1887 (50 Vict. c. 13), by which the Commissioners for the Park were incorporated, is examined the closer becomes the connection between the Crown and the commissioners. Further, the commissioners must be regarded as an emanation from the Crown and as the servants or agents of the Crown, because (1.) by amendment made in 1909 (by 9 Edw. 7, c. 24, s. 3) the Act incorporating the commissioners (which has frequently been amended since the contract was made, and is now R. S. O., 1937, c. 93) was made to declare that all works and lands whereon any expenditure was authorized pursuant to the Act were to be deemed to be "public works" of the province, the result of which was, by the Public Works Act (R. S. O., 1937, c. 54, s. 7) to vest them in the Crown; and (2.) by a further amendment in 1913 (3 & 4 Geo. 5, c. 14) it was provided that surplus revenues of the commissioners not required for their statutory purposes should be paid over to the consolidated revenue fund of the province. The character of the commissioners was considered in *Graham* v. *Commissioners for Queen Victoria Niagara Falls Park* (1); *In re Oakes and Township of Stamford* (2); and *Electrical Development Company of Ontario* v. *Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario* (3),

---

(1) (1896) 28 O. R. 1, 4, 12.
(2) (1926) 58 O. L. R. 624.
(3) [1919] A. C. 687, 690.

J. C.
1941
INTERNATIONAL RY. CO.
v.
NIAGARA PARKS COMMISSION.

where it was stated that "The park . . . . is under the charge "of these commissioners on behalf of the Ontario Govern-"ment." [Reference was also made to *Sanitary Commissioners of Gibraltar* v. *Orfila* (1) and *MacKenzie-Kennedy* v. *Air Council* (2).] The commissioners have no money in their hands to satisfy a judgment, and there is nothing in R. S. O. 1937, c. 93, which would entitle them to satisfy a judgment if they had the money. It would have to be dealt with in accordance with s. 21 of that Act, which means that moneys to satisfy any judgment given against the commissioners will have to be found by the Crown. This, therefore, is really an attempt to reach the revenues of the Crown by an action against the servant.

On the second point, namely, whether the company was entitled to interest on the compensation, counsel was not required to deal with the effect of s. 33 of the Judicature Act, R. S. O., 1937, c. 100, as a separate point. It is conceded that the rule in *Birch* v. *Joy* (3) is not limited solely to contracts for the sale of land. [Reference was made to the authorities cited by junior counsel for the company, and also to Fry on Specific Performance, 6th ed., p. 428, para. 907; *In re Joseph Clayton, Ld. Smith* v. *The Company* (4); the Sale of Goods Act, 1893, s. 52; and to *Maine and New Brunswick Electrical Power Co.* v. *Hart* (5), where it is stated that "in order to invoke a rule of equity it is necessary in the "first instance to establish the existence of a state of cir-"cumstances which attracts the equitable jurisdiction, as, for "example, the non-performance of a contract of which equity "can give specific performance."] Admittedly it is difficult to see why, as a matter of principle, the doctrine in *Birch* v. *Joy* (3) should not apply to cases of contract where the Court would grant specific performance. Properly looked at, however, this was not a transaction between vendor and purchaser, although interests in land are involved. Regarded as a whole, the contract of 1891 was not a sale but an agreement by which a licence was granted to the predecessors

(1) (1890) 15 App. Cas. 400, 408-9, 412.

(2) [1927] 2 K. B. 517, 523.

(3) 3 H. L. Cas. 565.

(4) [1920] 1 Ch. 257, 265.

(5) [1929] A. C. 631, 640.

in title of the company, on the relinquishment of which compensation was to be paid, and it is submitted that it is not a case in which the court would have granted specific performance. [*Swift & Co.* v. *Board of Trade* (1), per Viscount Cave L.C., was referred to.] *Toronto City Corporation* v. *Toronto Railway Corporation* (2) was decided on the construction of the particular agreement in that case. The position in the present case was correctly stated by McTague J.A., in the judgment of the Court of Appeal, where he said: "It must be apparent that at the end of the period the plaintiff "had nothing to sell. They did not then own a railway. All "they had was a right to compensation for the loss of their "investment under their original contract. It seems to me "that the transaction which took place at the end of the "period is part and parcel of the franchise agreement and "cannot be considered in any way separate from it."

April 28. The judgment of their Lordships was delivered by LUXMOORE L.J. as follows [after stating the facts:] The two questions to be decided in this appeal are (1.) whether the appellant company is entitled to interest on the $1,057,436 compensation fixed by this Board from September 12, 1932, until payment of the said sum; and (2.) whether it is competent to the appellant company, if entitled to interest, to sue for its recovery in an action against the commission. Logically, the second question should be decided first, for, if the contention of the commission which has been accepted by both the lower courts, namely, that the appellant company's only remedy is by petition of right, be correct, then it matters not in these proceedings whether the answer to the first question is in the affirmative or in the negative.

It is to be observed that the appellant company has not purported to sue the commission as representing the Crown, nor is the appellant company seeking to reach Crown property. The action is in form against the commission, a corporation created by statute with express power to sue and be sued. The action is based on a contract made by the commission

(1) [1925] A. C. 520, 532.

(2) [1925] A. C. 177.

J. C.
1941
INTERNATIONAL RY. CO.
v.
NIAGARA PARKS COMMISSION.

on its own behalf as well as on behalf and with the approval of the government of the province. The contract in this form was confirmed by the legislature (that is, by the Act of 1892), and is declared to be "valid and binding on the parties thereto." In their Lordships' view, the commissioners entered into the agreement of 1891 on the express terms that they were to be liable for its fulfilment, and it is, therefore, unnecessary to consider further the more difficult question which would have arisen if the words "on their own behalf" had been omitted, for there is nothing to prevent an agent from entering into a contract on the basis that he is himself to be liable to perform it as well as his principal. The words in the agreement "on their own behalf" are prima facie directed to separate liability when read in conjunction with the words that follow, namely, "as well as on behalf of" the Crown. Kelly J. gave no weight to these words. Indeed, he said he did not know what effect the words "on their own behalf" might have on the contract. He went on to say that "It is plain that the "defendant commission has no other capacity than that of "Crown agent or servant" (1). The Acts of incorporation plainly constitute the commission as a corporation with a separate legal entity, and in some, at any rate, of its powers it was obviously recognized that it would have contractual capacity separate from the Crown, e.g., the power to make itself responsible for the moneys secured by debentures issued under the Act, for it is provided that the repayment of the moneys secured by the debentures "may be guaranteed by "the Crown." This provision would be meaningless if the commission was not to be under any liability in the first instance. The Court of Appeal for Ontario also appears to have ignored these important words, for there is no reference to them in the judgment of McTague J.A., with which the other members of the Court of Appeal for Ontario agreed.

Kelly J., in his judgment, referred to the commission not only as being the agent or servant of the Crown, but also as "an emanation of the Crown." The latter phrase is also used

---

(1) [1940] O. R. 44.

J. C.
1941
INTERNATIONAL RY. CO.
v.
NIAGARA PARKS COMMISSION.

by McTague J.A. Their Lordships are unable to appreciate the precise meaning intended to be attributed to this phrase by the courts below. If it is intended to refer to the commission in some capacity other than that of agent or servant it is impossible to ascertain from the judgment delivered what the legal significance of that capacity may be. The word "emanation " is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is "that which "issues or proceeds from some source," and it is commonly used to describe the physical properties of substances (e.g., radium) which give out emanations of recognizable character. The word seems first to have been used by Day J. in *Gilbert* v. *Corporation of Trinity House* (1). In his judgment in that case Day J. said (2): "The Trinity House, to my mind, is "not in the position of a great officer of state. It is nothing "more than an amalgamation by authority of state of a vast "number of bodies having general authority over the light-"houses and beacons and buoys throughout the country for "the general convenience. It is a corporation with very great "powers vested in it by statute, but in no possible sense can "it be deemed to represent the Crown. All the great officers "of state are, if I may say so, emanations from the Crown. "They are delegations by the Crown of its own authority to "particular individuals. That is not the case with the Trinity "House, which has its nature and origin defined with sufficient "clearness to enable us to say that at any rate it is in no sense "an emanation from the Crown, nor in any way whatever a "participant of any royal authority." The learned judge in the passage quoted seems to use the word as synonymous with servant or agent and in no other sense. Their Lordships are of opinion that it would avoid obscurity in the future if the words agent or servant were used in preference to the inappropriate and undefined word "emanation."

Their Lordships are, for the reasons above expressed, of opinion that the appellant company's action against the commission is competent, and that the commission is properly sued under the agreement.

(1) (1886) 17 Q. B. D. 795.

(2) Ibid. 801.

It follows, therefore, that the question whether interest is recoverable by the appellant company on the compensation paid under the agreement falls to be determined. The claim of the appellant company to interest on the compensation money from the date when the commission entered into possession of the railway was in each of the courts below, as it was before this Board, based on the equitable principle applicable to cases of vendor and purchaser or quasi vendor and purchaser which requires the purchaser, when completing the contract, to pay interest on the amount of the purchase money from the time when the purchaser takes possession of the subject-matter of the contract.

Kelly J. refused the claim to interest because he held that the agreement was a contract with an owner of land whereby the other party agreed to construct and equip a railway on the owner's land and to deliver possession of the complete railway to the owner on a fixed day, retaining only a right to be compensated. The Court of Appeal for Ontario appear to have adopted this view. Their Lordships do not think that this constitutes an accurate summary of the agreement of 1891. The agreement contemplated that the appellant company would buy lands and rights over lands belonging to owners other than the commissioners, as in fact the appellant company or its predecessor did. These other lands were, it is true, of comparatively small value, but they were the property of the appellant company and must, in the events that have happened, be conveyed to the commission in the appropriate manner. Further, the whole of the equipment of the railway had to be handed over. Much of such equipment would not pass with the land although it formed part of the railway as a going concern. It is true that the agreement is not primarily an agreement for the sale of land, but it can properly be described as one for the transfer of the railway as a going concern. It cannot be properly described as an agreement for the supply of work and materials. The learned judge appears to have thought that what he describes as the rule in *Birch* v. *Joy* (1) applies only to cases of sale and purchase of land, but this is plainly not correct. The equitable rule was established many years before the decision in *Birch* v. *Joy* (1), which was decided in 1852. The true rule is that if in cases where courts of equity would grant specific performance the purchaser obtains possession of the subject-matter of the contract before the payment of the purchase price, he must, in the absence of express agreement to the contrary, pay interest on his purchase money as from the date when he gets possession until the date of payment, because it would be inequitable for him to have the benefit of possession of the subject-matter of the contract and also of the purchase money. The rule was applied in 1727 to the sale of a reversionary interest not in land: see *Ex parte Manning* (2). In 1807 it was applied to a sale of growing timber. In such a case the purchase price bears interest because the purchaser gets the benefit of the growth: see the 14th ed. of Sugden's Vendors and Purchasers, at p. 631. In the same year the rule was applied to the purchase of an annuity: see *Twigg* v. *Fifield* (3). In that case the sale was under the court, and took effect from the confirmation by the court of the master's report. Lord Eldon held that the purchase price must bear interest from that date because the purchaser then got the annuity. Sir Samuel Romilly, who was counsel for the vendor, appears from the report to have argued that the rule as to interest on purchase price applied only to sales of land, but this argument was not accepted. In 1827 the rule was applied to the sale of a leasehold public house with its stock in trade as a going concern: see *Dakin* v. *Cope* (4). There are, no doubt, many other cases to be found in the books.

---

(1) 3 H. L. Cas. 565.

The most important decision, however, so far as the present case is concerned, is to be found in *Toronto City Corporation* v. *Toronto Railway Corporation* (5) already mentioned. In that case Lord Cave said (6): " The general rule under which " a purchaser who takes possession is charged with interest " on his purchase money from that time until it is paid

---

(1) 3 H. L. Cas. 565.
(2) 2 P. Wms. 410.
(3) 13 Ves. Jun. 517.
(4) 2 Russ. 170.
(5) [1925] A. C. 177.
(6) Ibid. 193.

"is well established, and has on many occasions been "applied to compulsory purchases; and their Lordships "are not aware of any circumstances which would prevent "that principle from applying in the present case." One of the matters in dispute in the *Toronto* case (1) was whether the Toronto Railway Corporation was entitled to interest on the compensation payable to it for its railway. The material facts were as follows: In 1891 the Toronto Corporation, having agreed to take over certain street railways belonging to the Toronto Street Railway Company, invited tenders for the purchase of an exclusive right to operate these railways for a period of twenty years, extendible to thirty years in certain events. One of the conditions provided that at the termination of the period of operation the Toronto Corporation might take over all the real and personal property necessary to be used in connection with working the railways at a value to be determined by arbitration. On September 1, 1891, the Toronto Corporation assigned the railway and property acquired by it from the Toronto Street Railway Company to the persons who made the successful tender, the condition above referred to being incorporated in the assignment. Shortly after the assignment the legislature of Ontario passed a statute (55 Vict. c. 99) whereby the assignment was declared to be valid and binding on all parties for the full period of thirty years from September 1, 1891. By the same Act the Toronto Railway Company was incorporated and empowered to take over from the successful tenderers the agreement of September 1, 1891, and all the property, rights and privileges comprised therein. The statute contained a provision that, if the Toronto Corporation desired to exercise the right of taking over the property necessary to be used in the working of the railway at the termination of the said period of thirty years, it should give notice of its intention so to do, and might at once proceed to arbitrate in the manner specified in the conditions to which reference has already been made. The Act further provided that, if the award should not be effective by the date when the thirty years'

(1) [1925] A. C. 177.

term expired, the Toronto Corporation might take possession of the railway and all the property and effects thereof, real and personal, necessary to be used in connection with the working thereof, on payment into court either of the amount of the award, if made, or, if not made, on paying into court or to the company such a sum as a judge of the High Court of Justice of Ontario might order. The Toronto Railway Company took over the railway and its property and carried on the undertaking during the whole of the period of thirty years. The Toronto Corporation gave notice of its intention to take over the railway and its property, but on the expiration of the thirty years' period the arbitration for fixing the compensation payable to the Toronto Railway Company had not been concluded. An application was made to the court, when an order was made giving the Toronto Corporation the right to take possession of the railway and its property on payment to the Toronto Railway Company of $1,000,000 and into Court of $500,000 to abide the event of the arbitration. This order was complied with on August 31, 1921, when the Toronto Corporation took possession of the railway and its property. On January 30, 1923, a majority of the arbitrators awarded that the value of the Toronto Railway Company's railway was $11,188,500. There was considerable litigation in relation to the award, and there was ultimately an appeal to His Majesty in Council. The arbitrators had awarded to the Toronto Railway Company interest on the $11,188,500 from the date when the railway was taken over to the date of the award. When the matter was before the Court of Appeal for Ontario the court varied the award by striking out, among other things, the allowance of interest on the $11,188,500, on the ground that, though it was equitable that interest should be paid from the time of taking possession, there was no warrant for including it in the award.

The only difference between the facts of the *Toronto* case (1) and the present is that in the former case the corporation had an option of taking over the railway at the end of the franchise period, while in the present case there is no option, the commission being bound to take over the railway when the franchise period expired. Kelly J. sought to distinguish the *Toronto* case (1) from the present solely by reason of the existence of the option. The Court of Appeal for Ontario does not appear to have accepted this view, for McTague J.A. said in his judgment that it seems quite clear that the equitable rule as to interest applies in cases involving the sale of lands which include equipment and buildings, all as part of a railway undertaking, and he cites the *Toronto* case (1) in support of this opinion. Their Lordships are of opinion that the present case cannot properly be distinguished from the *Toronto* case (1), and their Lordships' opinion (as stated by Lord Cave) with regard to the operation of the general rule to which their Lordships in that case referred ought to have been followed.

---

(1) [1925] A. C. 177.

For these reasons their Lordships are of opinion that the appeal of the appellant company should be allowed, and the judgments of Kelly J. and the Court of Appeal for Ontario discharged, and that judgment should be entered for the appellant company for a sum equivalent to interest at 5 per cent. on the sum of $1,057,436 from September 12, 1932, to June 3, 1937, credit being given by the appellant company for the sum of $23,783.86 already paid by the commission in respect of interest, and that the commission should pay to the appellant company the costs of this appeal as well as the costs of the action and the costs of the appeal to the Court of Appeal for Ontario. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Gard, Lyell & Co.*

---

(1) [1925] A. C. 177.

By a petition presented on July 30, 1941, the appellants in the above reported appeal asked that the Order in Council made in the appeal on May 9, 1941, approving the Report of the Board and ordering " that the same be punctually observed,

J. C.
1941
INTERNATIONAL RY. CO.
v.
NIAGARA PARKS COMMISSION.

"obeyed and carried into execution" should be varied to include interest on the decretal sum. The petitioner submitted that "in the light of the said judgment of their Lordships the sum falling to be paid by the respondent to your petitioner should have been paid on June 3, 1937, and that interest thereon should justly be paid in respect of all periods after the said June 3, 1937, during which the said sum remained unpaid. If, however, the terms of your Majesty's said Order remain as they now stand, interest on the said sum will not be legally recoverable in respect of the period between the said June 3, 1937, and the said May 9, 1941, after which date it will be recoverable by virtue of the law of the Province of Ontario relating to interest on judgments.

" Your petitioner humbly submits that provision for the recovery of interest in respect of the period between the said June 3, 1937, and the said May 9, 1941, has been omitted as a result of oversight, and that in any event it is just and proper that interest should be awarded and paid in respect of the period in question."

The judgment of the Board (LORD THANKERTON, LORD ROMER, and LUXMOORE L.J.) on the petition, delivered by LORD THANKERTON, stated : In their Lordships' opinion effect should be given to the prayer of this petition. Under the decision recently pronounced by their Lordships it was found that interest on the original capital amount from September 12, 1932, to June 3, 1937, was a just debt of the respondents to the appellants as at June 3, 1937. That being so, it seems to follow that interest on that just debt would be properly given by their Lordships in view of the law of Ontario with regard to interest as explained by Lord Macnaghten in *Toronto Railway* v. *Toronto City Corporation* (1). Their Lordships regret that this matter was not developed either in the appellant's case or at the hearing. As it should have been, the petitioner will be required to pay the costs of the respondents so far as occasioned by this application. Their Lordships will humbly advise His Majesty accordingly.

(1) [1906] A. C. 117, 120.

[PRIVY COUNCIL.]

J. C.*
1941
April 28.

HEIRS OF PRINCE MOHAMED SELIM . APPELLANTS;

AND

ATTORNEY-GENERAL FOR PALESTINE RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Land registration—Rectification of new register—Onus of proof—Land (Settlement of Title) Ordinance, 1928–39, *ss.* 43, 66.

Sect. 43 of the Land (Settlement of Title) Ordinance, 1928–39, of Palestine, which provides that " . . . . the registration of " land in the new register shall invalidate any right conflicting " with such registration," is the keystone of the whole structure of the provisions for the registration of title, and the onus is on a party seeking rectification of the new register to show that the entry, which is prima facie right, ought not to be there. The register can only be rectified by showing that the entries on it are wrongly on it by fraud or mistake. The provision in s. 66 of the ordinance that rectification may be ordered where the court is satisfied that a right recorded in the existing registers has been " omitted " in the new register, means wrongly omitted.

Judgment of the Supreme Court of Palestine (1939) Pal. L. R. 8, affirmed in part.

APPEAL (No. 21 of 1940), by special leave, from a judgment of the Supreme Court of Palestine (January 12, 1939), reversing a judgment of the Land Court at Jaffa (November 18, 1937).

The following statement of the facts is taken from the judgment of the Judicial Committee:

The suit was brought by the plaintiffs [appellants], the heirs of Prince Mohamed Selim, himself one of the heirs of the late Sultan Abdul Hamid II. of Turkey, to recover lands said to have been the private property of the late sultan, and to have the land registry at Gaza rectified by inserting the names of the plaintiffs in respect of their share of the property in place of the High Commissioner for the time being in trust for the government of Palestine. The land in question was registered in the land register for Gaza in the name of the sultan from about the year 1886. The respondent's case was that, after the deportation of the sultan, the Ottoman Government, by various decrees, took the property in this land, and that, following the Treaty of Peace made in Lausanne in 1923, the government of Palestine acquired the land. The government by various ordinances proceeded to a settlement of this and other lands in Palestine, and this land was eventually entered in the new register [opened under the Land (Settlement of Title) Ordinance, 1928-1939] as in the proprietorship of the High Commissioner in trust for the government of Palestine. The suit of the plaintiffs was heard in May, 1937, before the two judges of the Land Court of Jaffa, Cressall and Daoudi JJ., who first determined on whom lay the onus of proof. They both agreed that the onus was on the defendant, the representative of the government, to support his title. Having so determined, they then heard the case, and after a hearing of six or seven days delivered considered judgments, Cressall J. holding that the defendant had failed to discharge the onus on him and Daoudi J. holding that he had succeeded. Having arrived at that position, the two judges proceeded, after argument, to decide what the result should be. They were referred to r. 2 of the Land Court Rules, 1921, which provided: "(1.) The Land Court shall, save as hereinafter provided, consist "of a British judge as president and a Palestinian member. "(2.) In case of disagreement the court may call in any "magistrate or member of the District Court or a cadi as a "third member." They refused to act on that rule, holding that it had been impliedly repealed by the Establishment of Courts Orders, 1924-1937, which provided, without any saving, that the Land Court of Jaffa should be constituted by the President of the District Court of Jaffa or a relieving president and one or more judges of the District Court of Jaffa. Such an ordinance, they considered, was inconsistent with a rule which provided that in the case of disagreement the court might be constituted by two judges and a magistrate or cadi. In any case, they held that the rule was facultative only, and not imperative, and that in this particular case they would not have followed it. They proceeded, therefore, to determine the case, and agreed that, as the defendant had to satisfy the court, and had only succeeded in satisfying one member of the court, he had failed in the suit, and they passed a decree in favour of the plaintiffs. On appeal the Supreme Court [Manning S.P.J., Greene and Frumkin JJ.] disagreed with the views expressed as to r. 2. They held that the rule was still in force, and was imperative. The Land Court, therefore, had not passed a valid judgment, and there must be a new trial. They also held that the Land Court were in error in placing the onus on the defendant. The appeal is reported at (1939) Pal. L. R. 8.

---

* *Present:* VISCOUNT SANKEY, LORD ATKIN, LORD THANKERTON, SIR GEORGE RANKIN, and CLAUSON L.J.

[The position with regard to disagreement in a civil court in Palestine, and also as to the constitution of the Land Court, having been remedied by recent ordinances of Palestine (see the judgment of the Judicial Committee) the argument is confined to the question of onus.]

1941. March 11, 12. *A. T. Miller K.C.* and *Colin Pearson* (for *G. C. Dunbar*, on war service) for the appellants. It was admitted, or proved, that the right of the appellants recorded in the " existing register "—which was the best possible proof of the right—had been omitted from the new register, and thereby there was put on the respondent the burden of proving that the appellants' right so recorded had been extinguished. The respondent has failed to discharge that burden. [Reference was made to art. 1737 of the Mejelle.]

Sir Donald Somervell A.-G. and *Norman Bentwich* for the respondent. The Land Court were wrong in placing the burden of proof on the respondent, and turning him into the plaintiff and the plaintiffs (appellants) into the defendants when in fact the respondent was in possession of the land claimed, and had a registered title, which was declared in the Land (Settlement of Title) Ordinance, 1928-39, s. 43, to be final and to invalidate any previous registration. It is, in any event, an accepted principle of Palestinian law, and also of English law, that a plaintiff who claims the ownership of land against a person in possession must recover by the strength of his own title and not by the weakness of the defendant's title, and the Land Court were wrong in placing on the defendant in possession the burden of disproving the plaintiff's claim. Owing to the burden of proof having been wrongly placed on the defendant by the Land Court, the hearing of the merits in that court was unsatisfactory and incomplete, and the issue was confused, and the Supreme Court were right in ordering a new trial as the only satisfactory way of dealing with the merits of the case. [Reference was made to the Settlement of Title (Procedure) Rules, Laws of Palestine, vol. iii., p. 1803, and to *Mamur Awqaf of Jaffa* v. *Government of Palestine* (1).]

A. T. Miller K.C. replied.

April 28. The judgment of their Lordships was delivered by LORD ATKIN [who stated the facts and continued :] Special leave to appeal was given by His Majesty in Council, but in the order it was provided that the appeal was to be confined to the grounds of the judgment of the Supreme Court. Within this limited scope it will be possible to deal shortly with this appeal. The grounds of the judgment which emerge as being those with which alone this Board are empowered to deal on the terms of the order giving leave to appeal are : (1.) Is r. 2 of the Land Rules, 1921, still operative ? ; and (2.) Was the onus of proof rightly placed on the defendant ? Their Lordships will be careful to decide nothing more.

(1.) On the first point their Lordships accept the reasoning of the Land Court. When an ordinance has prescribed without reserve that the court shall consist of two or more judges it seems impossible that a rule should survive which prescribes that in a certain event the court shall consist of two judges and a non-judge, whether magistrate or cadi. At the time of the decision no provision had been made for the event of disagreement, and it was thus impossible to rule that there was an imperative obligation to call in a third judge. Fortunately, this position has now been remedied, first by the Court Amendment Ordinance, No. 2, 1939, s. 6 (*a*), which expressly provides for the event of disagreement in a civil court, and further, by the Land Courts Amendment Ordinance, 1939, by which Land Courts are constituted of a President or relieving President of a District Court or of a British Magistrate's Court, or of a Magistrate's Court, dependent on the value of the subject matter in dispute. The interesting question as to what judgment should be given where the party on whom the onus of proof rests satisfies one of two judges composing a court and fails to satisfy the other, does not form one of the grounds of the judgment of the Supreme Court, and, therefore, is not now discussed.

---

(1) [1940] A. C. 503, 511.

(2.) But on the second question their Lordships are clearly of opinion that the Supreme Court are right. The matter can be disposed of by reference to two sections of the Land (Settlement of Title) Ordinance, 1928-1939, under which a new register of title was opened. By s. 43 : "Save as provided "in this ordinance, the registration of land in the new register "shall invalidate any right conflicting with such registration." By s. 66 : "After the completion of the settlement, rectification "of the register may be ordered by the Land Court, subject "to the law as to limitation of actions, either by annulling the "registration, or in such other manner as the court thinks fit, "where the court is satisfied that the registration of any person "in respect of any right to land has been obtained by fraud "or that a right recorded in the existing registers has been "omitted or incorrectly set out in the register: Provided "that, where a person has since the settlement acquired land "in good faith and for value from a registered owner, the court "shall not order a rectification of the register."

The argument of the appellants was, shortly: "Our title "is on the existing register. That constitutes a presumption "in our favour. Our title was 'omitted' from the new "register. Therefore, there is a presumption in favour of our "right to rectification." It can only be said that so to hold would be to eliminate for practical purposes the effect of s. 43, which, as in most provisions for the registration of title, is the keystone of the whole structure. Until the register is rectified the old title fails, and the register can only be rectified by showing that the entries on it are wrongly on it by fraud or

J. C.
1941
Heirs of Prince Mohamed Selim
v.
Attorney-General for Palestine.

mistake. " Omitted " in s. 66 means wrongly omitted, and the onus is quite plainly on the party seeking rectification to show that the entry which is prima facie right ought not to be there. In the result, the Land Court were wrong in placing the onus on the respondent, who was entitled to rely on his registered title until it was displaced. The only possible remedy appears to be the new trial ordered by the Supreme Court. The decision of the judges of the Land Court was obviously vitiated by their misdirection of themselves as regards onus, and, in view of the fact that there is only an appeal on a question of law, and that the determination of the dispute appears to involve questions of fact as well as law, no other decision could be adopted. It is, of course, unfortunate that several days of the former trial should prove to have been wasted. Possibly the parties may succeed in arranging that some, at least, of the evidence already given should be read at the new trial. But, in any case, a new trial appears inevitable.

For the above reasons their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal to His Majesty in Council.

Solicitors for appellants: *Bischoff & Co.*
Solicitor for respondent: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.*
1941
April 28.

SECRETARY OF STATE FOR INDIA . APPELLANT;

AND

SARDAR RUSTAM KHAN AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE COURT OF THE ADDITIONAL JUDICIAL COMMISSIONER IN BALUCHISTAN, AT QUETTA.

Treaty — Native State — Cession of sovereign rights — Recognition of pre-treaty proprietorial rights in land—Principle applicable—Government occupation of land—Act of State—No recourse to municipal courts—Foreign Jurisdiction Act, 1890 (53 & 54 *Vict. c.* 37), *ss.* 1, 16.

By an agreement, dated February 17, 1903, called the "Treaty "of 1903," made between the Khan of Kalat and the Government of India, the Khan ceded in perpetuity to the British Government, in consideration of the payment of an annual rent, the entire management of the Niabat (sub-division) of Nasirabad absolutely, with all the rights and privileges, state or personal, as well as full and exclusive revenue, civil and criminal jurisdiction, and all other powers of administration, including all rights to levy dues and tolls. Over part of the land comprised in the treaty the predecessors of the respondents held proprietorial rights granted to them by the Khan. After the date of the treaty a settlement of territory was made by the British Indian Government, and certain entirely waste lands, or "Pat," in the western district of the Niabat were entered in the settlement record as "Government unoccupied lands." The respondents, alleging that those lands were comprised in the grant from the Khan to their predecessors and that the Government had no title to them, claimed a declaration of their title to, and possession of, those lands:—

Held, that while the transaction of 1903 was in fact a perpetual lease of the territory at a quit rent, the territory not passing so as to become part of the British Dominions, but still remaining Kalat territory, nevertheless the Khan had made over to the British State the whole of his sovereign rights, and by the terms of the treaty, as well as by virtue of the provisions of s. 1 of the Foreign Jurisdiction Act, 1890, the Government of India had full sovereign rights over the territory in question, and had the right to recognize or not to recognize existing titles to land, so that the respondents had no recourse against the Government in the municipal courts.

Secretary of State in Council of India v. *Kamachee Boye Sahaba*

---

* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD ROMER, SIR GEORGE RANKIN, and CLAUSON L.J.

J. C.
1941
SECRETARY OF STATE FOR INDIA v. SARDAR RUSTAM KHAN.

(1859) 7 Moo. I. A. 476, 540, *Cook* v. *Sprigg* [1899] A. C. 572, 578, *Secretary of State for India* v. *Bai Rajbai* (1915) L. R. 42 I. A. 229, 237, and *Vayjesingji Joravarsingji* v. *Secretary of State for India* (1924) L. R. 51 I. A. 357, 360, referred to.

Decree of the Court of the Additional Judicial Commissioner reversed.

APPEAL (No. 50 of 1939), by special leave, from a judgment and decree of the Additional Judicial Commissioner in Baluchistan (November 6 and 19, 1936, respectively).

In 1880 one Mir Dur Mohammad Khan, the predecessor in title of the present respondents, obtained from the then Khan of Kalat a grant (sanad) of a large tract of waste land situated in the Nasirabad Tahsil of his State. The land was declared to have been "given" to the grantee for Rs.40,000, and the grant was made in contemplation of the excavation by the grantee of an extension of the Desert Canal. The grantee duly paid the price, and he and his heirs were in possession of the land when, on February 17, 1903, the then Khan executed an agreement, called a "Treaty," whereby he made over and ceded in perpetuity to the British Government the entire management of the Nasirabad Niabat absolutely, and with all the rights and privileges, state or personal, as well as full and exclusive revenue, civil and criminal jurisdiction and all other powers of administration, including all rights to levy dues and tolls. The British Government took early steps to arrange for the revenue administration, and a record of rights was prepared by the responsible executive officer, Mr. W. W. Smart, of the territory in question, and entirely waste lands were entered therein as "Government unoccupied lands." Those lands in fact comprised lands covered by the sanad of 1880, and the respondents, thirteen in number, thereupon instituted on September 14-15, 1936, in the Court of the District Judge, Sibi, the proceedings out of which this appeal arose, claiming a declaration of their title, and possession, an injunction restraining the defendant (appellant), the Secretary of State for India in Council, from encroaching on their land, and correction of the record of rights.

The appellant pleaded (inter alia) that, by the treaty of

J. C.
1941
SECRETARY OF STATE FOR INDIA v. SARDAR RUSTAM KHAN.

1903, Nasirabad was ceded to the British Government by the Khan of Kalat, a Sovereign State; that the acquisition of territory was an act of state; that any pre-existing rights which the respondents might have derived from the Khan were irrelevant, and the British Government was not bound to recognize them; and that the municipal courts had no jurisdiction to try or determine the matter.

The terms of the Treaty of 1903 are set out fully in the judgment of the Judicial Committee.

On June 22, 1936, the Judicial Commissioner in Baluchistan transferred the case from the file of the District Judge, Sibi, to his own file, and directed that it should be disposed of by the Additional Judicial Commissioner.

The Additional Judicial Commissioner (Mr. Rangi Lal) held (inter alia) that the treaty was nothing more than a lease pure and simple, and could not by any means be said to be an act of state on the part of the British Government; that if the position of the British Government was that of a lessee, its rejection of the respondents' claims could not be an act of state. He was of opinion that the case was of a simple nature, and that the respondents were suing as vendees to enforce their rights under a sale, against the representative of their vendor (the Khan). He held that under the sanad the respondents had acquired indefeasible rights in the land in suit, and could enforce them in the Kalat courts, and, after the Treaty of 1903, in the British courts. In the result, he decreed the suit, with costs.

The Secretary of State for India in Council appealed.

1941. Mar. 18, 19. *J. M. Tucker K.C.* and *J. M. Pringle* for the appellant. The case raises a question of some importance as to the rights of the British Indian Government under the Treaty of 1903. The land in suit is still in a Native State, outside British India, and the sovereignty of that State is in the Khan of Kalat, but, by virtue of the treaty, full jurisdiction is exercised over the territory in question by the British Government. The appellant's contention is that the grant to Mir Dur Mohammad Khan in 1880 by the then

Khan was a mere lease, and not a transfer of complete ownership. The Judicial Commissioner appears to have held that the ownership in the land passed to the predecessors in title of the present respondents. Assuming, however, that the grant did convey the full ownership, the treaty, when entered into, gave to the British Government the same rights over this State as it would have had had it been acquired by conquest: Foreign Jurisdiction Act, 1890. After the treaty the British Government took full control of the territory, and then settled it. The question for this Board is whether the act of the British Government in deciding to take no notice of any titles which existed before the date of the Treaty, except in so far as it chose to act upon them, was not just as if it was an ordinary act of state on conquest. The British Government was under no obligation to recognize any private rights in land in that territory which had been created before the treaty, and it was thereafter at liberty to create or recognize such new private rights in those lands as it might think fit; its decision in each of those respects is not a matter which can be questioned in any municipal court.

The first question for decision is as to the effect of the treaty—whether it is a treaty, or a mere agreement between two Governments which would not interfere with existing titles granted by the ceding Government before the treaty. There was by the treaty a passing, in substance, of every sovereign right—it was saying, as nearly as possible, "complete "cession of sovereignty." Assuming that it had been a complete cession of sovereignty, then the British Government could not have been bound by any municipal court as to their treatment of then existing rights. A new title began with the treaty. What was ceded was every right and power that the Khan had as a sovereign, and acts done under the treaty are in the same position as ordinary acts of state done under a treaty of complete cession. The position in this case is not very different from what it was in *Dattatraya Krishna Rao Kane* v. *Secretary of State for India* (1). [Reference was also made to *Secretary of State in Council of India* v. *Kamachee*

(1) (1930) L. R. 57 I. A. 318, 323-24.

Boye Sahaba (1) and *Cook* v. *Sprigg* (2).] The present is the first case of its kind, and although here there is not a parting with actual sovereignty, there is a parting with everything but the show of sovereignty, and the legal result would be the same as in a case of cession by conquest. By the terms of the treaty, as well as by the terms of the Foreign Jurisdiction Act, 1890, the British Government was free to elect to recognize or not to recognize such pre-treaty rights in the suit lands as the respondents might have acquired under the sanad of 1880, or otherwise.

Gibson K.C., Sir Hari Singh Gour, and *S. P. Khambatta* for the respondents. For the purpose of the argument for the appellant it was assumed that there is no question about the title of the respondents to the suit lands. The law on the subject of cession rights is explained in *Sobhuza II.* v. *Miller* (3) [the whole judgment in that case was read]. It was also submitted for the appellant that what was done was done as an act of state. All the authorities are clear that that is a matter of intention, and, accordingly, the respondents are entitled to ask whether it was the intention that what was done by Mr. Smart, the executive officer, when he entered the suit lands in the record of rights as "Government "unoccupied lands," and so deprived the respondents of their title, was an act of state. The answer must be that it was not so intended. The quality of that act on that date was no different from its quality now. The facts and circumstances of the matter at the time show that it was not the intention of the Government to confiscate at all. The appropriate Revenue Official said that the matter was one to be decided in the courts, and that alone is destructive of the argument that what was done was an act of state.

The next question is whether there was warrant in the agreement of 1903 for depriving the respondents of their ownership of the lands. The agreement must be considered in the light of the circumstances at the time. There is not one clause in it which gives one square inch of territory to the British Government. There is no warrant whatsoever in

---

(1) (1859) 7 Moo. I. A. 476, 530-31.
(2) [1899] A. C. 572, 574.
(3) [1926] A. C. 518.

J. C.
1941

SECRETARY OF STATE FOR INDIA
v.
SARDAR RUSTAM KHAN.

this agreement for depriving the Khan's subjects of their goods and chattels, and no warrant at all for depriving them of their lands. It was said in *Amodu Tijani* v. *Secretary, Southern Nigeria* (1) that "a mere change in sovereignty is not to be "presumed as meant to disturb rights of private owners; "and the general terms of a cession are prima facie to be "construed accordingly" (2). That is very strong indeed. The present case is a fortiori; here there is not a change of sovereignty; the title to the land remains in the Khan, and the respondents are the Khan's subjects. [Reference was also made to Dicey's Conflict of Laws, 5th ed., p. 212, re act of State.] This agreement must be subjected to a strict construction. The Ruler of the State was, and remains, a Sovereign Prince, and everything is left except what was taken away. This is a matter of revenue, and it was to enable the revenue to be got in that the management was handed over to the British Crown. Further, in *West Rand Central Gold Mining Company* v. *Regem* (3) it was said: "It must not be "forgotten that the obligations of conquering states with "regard to private property of private individuals, particularly "land as to which the title had already been perfected before "the conquest or annexation, are altogether different from the "obligations which arise in respect of personal rights by "contract" (4). The full intendment of the law is against forfeiture: *Colquhoun* v. *Society of Contributors to Widows' Fund of Faculty of Procurators in Glasgow* (5); in that case it was said that forfeitures "are not favoured in the law" (6), and that applies in the present case. Finally, if it is sought to deprive the respondents of their proprietory rights, then a wrong has been committed: *Johnstone* v. *Pedlar* (7). There is no warrant here for interfering with the title of the respondents which, ex hypothesi, was a good and valid one. It was not the intention of the Government of India to sanction the deprivation of the respondents of their ownership in the suit lands. The transaction was a purely commercial one between the Khan and the Governor-General of India, and, as such, it was subject to the ordinary law, and, in the absence of such law, to the rule of justice, equity and good conscience. The Governor-General is an officer of the Crown, created by law, and his powers, as such, are statutory and limited. Even as successor to the late East India Company his powers are commercial and administrative, and as such there is no room for the application of the doctrine of act of state to a case subject to the ordinary law of contracts.

---

(1) [1921] 2 A. C. 399.
(2) Ibid. 407.
(3) [1905] 2 K. B. 391.
(4) Ibid. 411.
(5) 1908 S. C. (H. L.) 10.
(6) Ibid. 19.
(7) [1921] 2 A. C. 262, 268, 279.

Sir Hari Singh Gour followed, and referred to Anson's Law and Custom of the Constitution, Pt. II., p. 336; to *P. & O. S.N. Co.* v. *Secretary of State for India* (1), and ss. 29 and 32 of the Government of India Act, 1915 (5 & 6 Geo. 5, c. 61). Any contract which is made by the Secretary of State in Council must conform to the provision of s. 29 of the Act of 1915. It is clear from the terms of the document of 1903 that it was intended to be a commercial agreement. The civil and criminal jurisdiction is necessary for the collection of revenue. Whether the agreement was a commercial one or a treaty, the Governor-General is not authorized to make such a treaty on behalf of His Majesty. [Reference was made to *Forester* v. *Secretary of State for India in Council* (2).]

J. M. Tucker K.C. replied, and referred to Ilbert's Government of India, 2nd ed., p. 176, and to *Sobhuza II.* v. *Miller* (3), *Vajesingji Joravarsingji* v. *Secretary of State for India* (4), and *Secretary of State for India* v. *Bai Rajbai* (5).

Apr. 28. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal, by special leave, from the judgment of the Additional Judicial Commissioner in Baluchistan, in which in the respondents' suit he made a decree declaring their title to, and granting them possession of, the lands in suit. The appeal raises an important question as to the powers of the British Government over the sub-division of Nasirabad, part of the territory of the Khan of Kalat, under a document dated February 17, 1903, purporting to be an agreement made between the Khan of Kalat and Colonel Yate, Agent to the Governor-General in Baluchistan. The agreement was expressed to be subject to the confirmation of the Viceroy and Governor-General in Council, and was duly confirmed on May 14, 1903. The circumstances in which the agreement was made appear to be that for many years part of this district had been irrigated by canals flowing from the Indus, and that arrangements had been made between the Khan and the British Government by which occupiers of land benefited were made subject to a water tax assessed by British officials, collected by Kalat officials, of which the proceeds were divided equally between the two Governments. This species of dual control naturally proved irksome, and the remedy was found in the agreement in question, styled, without prejudice to its accurate description in law, the Treaty of 1903. It is in the following terms: "Agreement entered "into by His Highness the Khan of Kalat, Mir Mahmud Khan, "G.C.I.E., on the one part, and by the Hon'ble Colonel "C. E. Yate, C.S.I., C.M.G., Agent to the Governor General in "Baluchistan, on the other part, subject to the confirmation "of His Excellency the Viceroy and Governor General in Council.

---

(1) (1861) 5 Bom. H. C. R. (Appdx. A.).

(2) (1871-2) L. R., I. A. Supplmt. 10, 17.

(3) [1926] A. C. 518.

(4) (1924) L. R. 51 I. A. 357, 360.

(5) (1915) L. R. 42 I. A. 229, 238.

"Executed at Sibi on the seventeenth day of February, one "thousand nine hundred and three.

"I. Whereas it has been found by experience to be to the "advantage of both the British Government and His Highness "Beglar Begi Mir Mahmud Khan, G.C.I.E., Khan of Kalat, "that the Niabat of Nasirabad should be exclusively managed "by the officers of the British Government, it is hereby declared "and agreed as follows:—

"His Highness Mir Mahmud Khan, Khan of Kalat, on behalf "of himself and his heirs and successors, hereby makes over "and cedes in perpetuity to the British Government the "entire management of the Nasirabad Niabat absolutely and "with all the rights and privileges, state or personal, as well "as full and exclusive revenue, civil and criminal jurisdiction "and all other powers of administration, including all rights "to levy dues and tolls on the following conditions:—

"(1.) That the said Niabat shall be administered, on behalf "of the British Government, by or through such officer or "officers as the Governor General in Council may appoint for "the purpose with effect from the 1st day of April, one thousand "nine hundred and three, or such subsequent date as the "Government of India may take it over.

"(2.) That the British Government shall pay to His Highness "on the first day of April, one thousand nine hundred and "four and thereafter, annually, on the first day of April each "year, fixed annual rent of Rs.1,15,000 (one hundred and "fifteen thousand).

"(3.) That the aforesaid sum of Rs.1,15,000 (one hundred "and fifteen thousand), shall be paid to His Highness without "any deduction of cost of administration.

"II. The boundary of the Nasirabad Niabat as described "by His Highness the Khan of Kalat's Naib, Ghaus Bakhsh, "in July, 1902, is as follows :—

"On the South the Sind Border, on the North, commencing "eastwards at the Leni Burj, it runs North-Eastwards along "the Mazari border of the Bugti Hills. It follows the foot "of these Hills running in a westerly direction to their nearest "point to the Shahpur Road near the Manak Garhi Nulla. "It then follows this Nulla as far as the Shahpur Road, then "follows the Shahpur Road South as far as the Deh Chattan "lands (generally known as Dodaika) and then turns West "following the boundary of Dodaika to the Nurwah Channel "above the point to where the water reaches. It then follows "the Nurwah as far as the junction of the latter with the Dur "Mohammad Wah, which is shown on most maps as the "Shahiwah, a continuation of the main desert canal. From "this point it follows the Dur Mohammad Wah right along "its course to the West and South-West crossing the railway "at mile 368, five miles North of Jhatpat Station, until it "meets the line of pillars erected about 4 years ago by the "Magassis and Jamalis as their mutual boundary. It then "follows this line of pillars Southwards to the Sind border, "passing about 500 yards to the West of the point where the "Sonwah has been closed.

"III. Whereas it is possible that the lower portion of the "Manjuti lands enclosed by a straight line drawn from the "place where the Dur Mohammad Wah crosses the railway, "near mile 368, to a point on the Jacobabad-Shahpur Road, "8 miles to the North of where the Dur Mohammad Wah "crosses that road may hereafter be brought under irrigation, "His Highness the Khan of Kalat hereby agrees, on behalf "of himself, his heirs and successors, to make over and cede "to the British Government in perpetuity that portion of the "Manjuti land in the same manner as the Nasirabad Niabat "above referred to, and it is hereby agreed that the British "Government shall pay to His Highness annually an additional "rent of rupees two thousand five hundred, making a total "quit-rent of Rs.1,17,500 to be paid on the first day of "April one thousand nine hundred and four and subsequent "years.

"IV. And whereas it is advisable that any further Kalat "State lands outside the present boundary of the Nasirabad "Niabat, which may hereafter possibly be brought under "irrigation by branches and extensions from existing British "Canals, should also come under British administration in "the same manner as the Nasirabad Niabat above referred to, "His Highness the Khan agrees to make over on lease in "perpetuity any lands in the Lehri Bhag and Gandawa Niabats "that may hereafter be found to be irrigable from existing "British Canals at a fair quit-rent which can be determined "when the surveys have been completed."

"MIR MAHMUD KHAN
"CHAS. E. YATE, Colonel,
"Agent to the Governor General in Baluchistan.
"CURZON
"Viceroy and Governor General of India.

"This agreement was ratified by His Excellency the Viceroy "and Governor General of India at Simla on Thursday, this "14th day of May, 1903.

"LOUIS W. DANE,
"Secretary to the Government of India in the
"Foreign Department."

Over part of the land comprised in the agreement the predecessors of the plaintiffs held proprietorial rights granted to them by the then Khan of Kalat. For the purposes of this case it may be assumed that the grants continued to be of full force up to the date of the agreement. After it had been made, the Government of India decided that there should be a settlement of the territory on the lines of the settlement in Sind. A civil servant with experience of Sind, Mr. Smart, was appointed, and began work in October, 1905, which he completed in April, 1907. The principles to be adopted in determining what existing titles, if any, were to be recognized in the settlement were decided from time to time in the course of the work. The district was treated as divided into two sections, the eastern and the western, the former being better irrigated and more cultivated than the western, in which the lands in suit are situate. This section has an area of about 372,000 acres, of which a large part was waste and uncultivated. In October, 1906, there was a conference between the Agent to the Governor-General and the Revenue Commissioners in Baluchistan and Mr. Smart, in which decisions were made which were carried out in the settlement record, and in respect of which the present dispute arises. It will be convenient to set out in the words of Mr. Smart in his settlement report the principles upon which the settlement proceeded.

"3. The method of inquiry pursued in the preparation of the "settlement records has been the same for the eastern and "western sections with one exception. In the eastern section "it was considered necessary to make detailed inquiries into "all cases where possession of land had been acquired by a "doubtful title.

"The principle which was adopted was as follows :—

"Wherever figures of cultivation for the last 12 years showed "that an occupant had cultivated one-third of the holdings "he claimed, no inquiry into title was to be made. Inquiries "into title were made wherever this condition was not fulfilled, "provided the claim of the occupant had not been established "by some previous decisions of competent authority. The "principle followed involved a great deal of trouble, and the "nature of evidence to be collected was often extremely "complicated.

"In the western section, owing to the existence of old "Sanads from His Highness, the Khan of Kalat, it was decided "in a note of the conference held on 5th October, 1906, between "the Hon'ble the Agent to the Governor-General, Revenue "Commissioner, and myself, that the following principles "should be employed. The total irrigable lands were to be "divided in three classes. 'A' lands already irrigated and "cultivated (allowing for fallow years) were to be entered in "the names of present occupants, provided they showed "reasonable title, e.g., continued possession for 12 years. "'B' lands commanded by existing canals or Zemindari "water-courses therefrom, which are in use but not irrigated "owing to scarcity of water, were to be entered in the name "of claimants showing the best title, on condition that the "Sind Fallow Rules will apply to them from the Kharif Season "of 1907; a notice was to be served on such claimants "informing them that they would be liable to pay assessment "in the fifth year, whether they had cultivated the land or "not, provided they had not paid assessment once in the "past four years.

"'C' land, which is entirely waste or 'Pat,' was to be "entered as Government unoccupied lands.

"These principles have been followed in the settlement of "the western section. The method employed in the work of "settlement is otherwise the same for both sections."

The area of the "C" lands thus entered as Government unoccupied lands extended to about 141,000 acres. The present suit is concerned with all the lands over which the plaintiffs held rights granted by the Khan of Kalat; but the controversy was particularly directed to "C" lands, the plaintiffs claiming that as they were comprised in their grant from the Khan the Government have no title to them. The answer of the Government is that the treaty of 1903 gave them full sovereign rights over the territory; that if they decided to ignore the rights of previous holders, and to substitute as owners either themselves or anyone else, no one had a right to complain in a municipal court; that the acts of the Government in making the treaty, and in exercising its powers under it, were acts of State for which the Government could not be impleaded.

It is necessary, therefore, to refer to the treaty to see what its juristic effect was. According to the plaintiffs, it was merely what their counsel styled "a commercial contract," intended only to effect a more convenient method of collecting revenue, and granting powers only for that object. Their Lordships cannot take this view. It is opposed to the plain wording of the document, and to the obvious construction when the treaty is regarded as a whole. "Cedes in perpetuity ". . . . the entire management of the Nasirabad Niabat "absolutely and with all the rights and privileges, state or "personal, as well as full and exclusive revenue, civil and "criminal jurisdiction and all other powers of administration" are words creating rights between two sovereign States which were never yet found in any mere commercial agreement. It is true that the right ceded is the entire "management," and the consideration is an annual rent; and, as is made clearer in para. 4 of the treaty, the transaction is in fact a perpetual lease of the territory at a quit rent. Nevertheless, the Sovereign of Kalat made over to the British State the whole of his sovereign rights, though as the cession takes the form of a lease the territory does not pass so as to become part of the British Dominions, but still remains Kalat territory. The Government therefore are entitled to rely, if necessary, upon the provisions of the Foreign Jurisdiction Act, 1890, s. 1: "It is and shall be lawful for Her Majesty the Queen "to hold, exercise, and enjoy any jurisdiction which Her "Majesty now has or may at any time hereafter have within "a foreign country in the same and as ample a manner as if "Her Majesty had acquired that jurisdiction by the cession "or conquest of territory."

By s. 16, "In this Act 'foreign country' means any country "or place out of His Majesty's dominions. The expression "'jurisdiction' includes power." It is perhaps unnecessary to say that the statute does not increase the powers given to His Majesty in the foreign country. It is the power given, and no other, which may be exercised as if acquired by conquest or cession. In the present case the powers given are "all the "rights and privileges, state or personal." It is plain that these rights and privileges are to be exercised in as ample a manner as if acquired by conquest or cession. On the legal position that arises in such circumstances there is a wealth of weighty authority. In *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1) the East India Company, who had in 1855 entered into treaties with the Rajah of Tanjore not dissimilar from the treaty in the present case, had seized the whole Raj of Tanjore on the death of the last Rajah without leaving issue male. It was held that the East India Company were possessed of sovereign powers; that they had exercised those powers not under colour of law but as acts of state, and that they and their successors could not be impleaded in any municipal court for what was so done. In the judgment of the Judicial Committee, delivered by Lord Kingsdown, occur the following words (2): "The result, in their Lordships' "opinion, is, that the property now claimed by the respondent "has been seized by the British Government, acting as a "Sovereign power, through its delegate the East India Com-"pany; and that the act so done, with its consequences, is an "act of state over which the Supreme Court of Madras has "no jurisdiction. Of the propriety or justice of that act, "neither the court below nor the Judicial Committee have the "means of forming, or the right of expressing, if they had "formed, any opinion. It may have been just or unjust, "politic or impolitic, beneficial or injurious, taken as a whole, "to those whose interests are affected. These are considera-"tions into which their Lordships cannot enter. It is sufficient "to say that, even if a wrong has been done, it is a wrong "for which no municipal court of justice can afford a remedy."

In *Cook* v. *Sprigg* (3) the plaintiffs claimed to be grantees of concessions made to them by the paramount chief of

---

(1) (1859) 7 Moo. I. A. 476.
(2) Ibid. 540.
(3) [1899] A. C. 572.

J. C.
1941

SECRETARY OF STATE FOR INDIA v. SARDAR RUSTAM KHAN.

Pondoland before annexation of Pondoland by the British Government. Lord Halsbury L.C., giving the judgment of the Judicial Committee, said (1): "It is a well-established principle "of law that the transactions of independent States between "each other are governed by other laws than those which "municipal courts administer. It is no answer to say that "by the ordinary principles of international law private "property is respected by the sovereign which accepts the "cession and assumes the duties and legal obligations of the "former sovereign with respect to such private property "within the ceded territory. All that can be properly meant "by such a proposition is that, according to the well understood "rules of international law, a change of sovereignty by cession "ought not to affect private property, but no municipal "tribunal has authority to enforce such an obligation."

In *Secretary of State for India* v. *Bai Rajbai* (2) the circumstances were that in 1817 the Gaekwar had ceded the district of Ahmedabad to the British Government. In 1898 claims were made by the plaintiffs against the Government asserting permanent rights to lands within the district existing before the cession. The Judicial Committee came to the conclusion that the question entirely depended upon the extent to which the British Government had recognized pre-cession rights (3): "The relation in which they stood to their native sovereigns "before this cession, and the legal rights they enjoyed under "them, are, save in one respect, entirely irrelevant matters. "They could not carry on under the new régime the legal "rights, if any, which they might have enjoyed under the old. "The only legal enforceable rights they could have as against "their new sovereign were those, and only those, which that "new sovereign, by agreement express or implied, or by "legislation, chose to confer upon them."

Their Lordships will conclude this review of authorities with the words of Lord Dunedin, in giving the judgment of the Board in *Vayjesingji Joravarsingji* v. *Secretary of State for India* (4). In that case territory in Gwalior had been ceded to the British Government by the Maharajah Scindia by a treaty which expressly provided that each Government should respect the conditions of existing leases. The appellants had brought a suit for a declaration that they were pre-cession proprietors of the lands in question. It was stated in the judgment (1): "A summary of the matter is this: when a "territory is acquired by a sovereign state for the first time, "that is an act of state. It matters not how the acquisition "has been brought about. It may be by conquest, it may be "by cession following on treaty, it may be by occupation of "territory hitherto unoccupied by a recognised ruler. In all "cases the result is the same. Any inhabitant of the territory "can make good in the municipal courts established by the "new sovereign only such rights as that sovereign has, through "his officers, recognised. Such rights as he had under the "rule of predecessors avail him nothing. Nay, more, even "if in a treaty of cession it is stipulated that certain inhabitants "should enjoy certain rights, that does not give a title to "those inhabitants to enforce these stipulations in the municipal "courts. The right to enforce remains only with the high "contracting parties."

---

(1) [1899] A. C. 578.
(2) (1915) L. R. 42 I. A. 229.
(3) L. R. 42 I. A. 237.
(4) (1924) L. R. 51 I. A. 357.

These decisions were again adopted by the Board in *Dattatraya Krishna Rao Kane* v. *Secretary of State for India* (2), where they were applied to a claim to enforce pre-cession rights in territory leased in perpetuity by H.H. the Nizam to the British Government in 1902. It follows, therefore, that in this case the Government of India had the right to recognize or not recognize the existing titles to land. In the case of the lands in suit they decided not to recognize them, and it follows that the plaintiffs have no recourse against the Government in the municipal courts. An explanation for Government action was at one time given that the plaintiffs were in breach of their conditions of tenure to the Khan of Kalat. Whether this be true or not is clearly irrelevant in view of the established law regulating the position of the Government as against former proprietors. Neither it nor any action of government officials indicates any intention on the part of the Government

(1) (1924) L. R. 51 I. A 360.

(2) (1930) L. R. 57 I. A. 318.

J. C.
1941
SECRETARY OF STATE FOR INDIA v. SARDAR RUSTAM KHAN.

to recognize this existing title in these lands. On the contrary, the decision made in October, 1906, by the high officials, together with Mr. Smart, that the plaintiffs were only to be given inalienable occupancy rights over some of the lands, while the "C" lands were to be entered as government lands, indicates conclusively what the intention of the Government was; and it only needed the confirmation of the report by the Government of India, which was signified on April 1, 1908, to conclude the matter.

In accordance with these authorities their Lordships have not considered whether the decision was just or unjust, politic or impolitic; and it must not be considered that they have had any material placed before them to indicate that it was, in the circumstances, either unjust or impolitic. Their Lordships will humbly advise His Majesty that this appeal should be allowed, and the respondent's suit dismissed, with costs. The respondents must pay the costs of this appeal.

Solicitor for appellant: *Solicitor, India Office.*
Solicitors for respondents: *Hy. S. L. Polak & Co.*

[PRIVY COUNCIL.]

J. C.*
1941
May 20.

DAIREN KISEN KABUSHIKI KAISHA AND OTHERS . . . . APPELLANTS;

AND

SHIANG KEE (OTHERWISE KNOWN AS THE CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED) . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION).

Hong Kong—Company—Foreign company—Branch in Colony—Dissolution of company in country of incorporation—Jurisdiction of Colonial Court to wind up branch—Companies Ordinance, No. 39 *of* 1932, *s.* 313, *sub-ss.* 1, 2.

A company incorporated under the laws of, and resident in, the Republic of China, and having one of its branches at Hong Kong where there were valuable assets belonging to it, was dissolved in China by a decree of a Chinese court in accordance with the law of China. The respondents, shareholders in the company, presented a petition in the Supreme Court of Hong Kong for the winding-up of the company in the colony under the provisions of the Companies Ordinance, 1932:—

Held, that the company, having ceased to exist by an act of the country by which, and under the laws of which, it was made a juristic entity, must be treated as non-existent by all courts administering English law, and, since the non-existent company must necessarily have ceased to carry on business in Hong Kong, the Supreme Court of the colony, quite apart from any principle of English law, was expressly empowered to make the winding-up order by sub-s. 2 of s. 313 of the Companies Ordinance, 1932, which provided that: "Where a company incorporated outside "the colony which has been carrying on business in the colony "ceases to carry on business in the colony, it may be wound up "as an unregistered company under this Part of this Ordinance, "notwithstanding that it has been dissolved or otherwise ceased "to exist as a company under or by virtue of the laws of the "country under which it was incorporated."

Lazard Bros. & Co. v. *Midland Bank* [1933] A. C. 289, 297, and *In re Russian Bank for Foreign Trade* [1933] 1 Ch. 745, referred to.

Judgment of the Supreme Court (Appellate Jurisdiction) affirmed.

* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD ROMER, SIR GEORGE RANKIN, and CLAUSON L.J.

J. C.
1941
DAIREN KISEN KABUSHIKI KAISHA
v.
SHIANG KEE.

Appeal (No. 41 of 1940) from a judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) (January 5, 1940), which had affirmed an order of the Chief Justice of the Supreme Court of Hong Kong (July 3, 1939) on a petition of the respondents for the winding up of the Hong Kong branch of the Ching Kee Steam Navigation Co., Ld.

The following statement of the facts is taken from the judgment of the Judicial Committee: The appellants and the respondents were shareholders in a company known as the Ching Kee Steam Navigation Co., Ld. The company was incorporated in 1920 under the laws of the Republic of China, and had its head office at Chefoo, in the Chinese province of Shantung. It had also several branches, one of which was situated at Hong Kong. Its main business was that of owning steamships, of which, at the outbreak of hostilities between China and Japan, it possessed twenty. Of those six were in the harbour of Hong Kong. On February 21, 1939, the company was dissolved by decree of the District Court of Chungking, Szechuen. In the normal course of things the jurisdiction to make such a decree in the case of this company would have been vested in the District Court of Fooshan, in the province of Shantung, of which the immediate higher court was the Shantung Provincial Court, but in February, 1939, the Japanese were in military occupation of the province and the Chinese courts there were not able to exercise their judicial functions. It was, however, provided by the Chinese Code of Civil Procedure that, whenever a competent court could not legally or physically exercise its judicial powers, an immediate higher court might designate some other court to assume jurisdiction. Accordingly, on February 20, 1939, the Supreme Court of China made an order designating the District Court of Chungking, Szechuen, to assume jurisdiction over the case of the company. In view of the dissolution of the company, the respondents, on March 29, 1939, presented a petition in the Supreme Court of Hong Kong for the winding-up of the company under the provisions of the Companies Ordinance, No. 39 of 1932, the material provisions of which were: "313 (1.) (*b*) The circumstances in which an "unregistered company may be wound up are as follows: (i.) "If the company is dissolved, or has ceased to carry on business, ". . . . . (iii.) If the court is of opinion that it is just and "equitable that the company should be wound up. 313 (2.) "Where a company incorporated outside the colony which "has been carrying on business in the colony ceases to carry on "business in the colony, it may be wound up as an unregistered "company under this Part of this Ordinance, notwithstanding "that it has been dissolved or otherwise ceased to exist as "a company under or by virtue of the laws of the country "under which it was incorporated." The petition came on for hearing before the Chief Justice of Hong Kong (MacGregor C.J.) on July 3, 1939, when a winding-up order was made. In the meantime, namely, on May 5, 1939, the order dissolving the company made by the District Court of Chungking had been taken by way of appeal to the Supreme Court, Szechuen, and the appeal had been dismissed. The present appellants, who had opposed the making of the winding-up order by the Chief Justice, appealed to the Full Court of Hong Kong (Lindsell and Fraser JJ.) who, by order dated January 5, 1940, dismissed the appeal, with costs. From that order an appeal was now brought before His Majesty in Council.

1941. April 29. *Vaisey K.C.* and *Harry Atkins* (for *Charles Stevenson*, on war service) for the appellants.

Sellers K.C. and *Kenelm Preedy* (for *Eric White*, on war service) for the respondents.

May 20. The judgment of their Lordships was delivered by LORD ROMER, who stated the facts as set out above and continued: In opposing the petition before the Chief Justice the appellants relied solely on what they conceived to be the merits of their case. But in the Full Court they put forward, in addition, an altogether new contention. They asserted that, by reason of the military occupation of the province of Shantung by the Japanese forces, the jurisdiction of the Chinese courts over the company had been ousted; that the

J. C.
1941
DAIREN KISEN KABUSHIKI KAISHA
v.
SHIANG KEE.

decree of February 21, 1939, was a nullity; and that, accordingly, the company had never been dissolved. The Full Court had no difficulty in repelling this contention, and Mr. Vaisey, in presenting his arguments on behalf of the appellants before this Board, frankly, and quite properly, admitted that he could not challenge the correctness of the decision of the Full Court on this point.

The position, therefore, is this. The company has ceased to exist by an act of the country by whose acts and under whose law it was made a juristic entity, and must, accordingly, be treated as non-existent by all courts administering English law: see as to this the observations of Lord Wright in *Lazard Bros. & Co.* v. *Midland Bank* (1). In these circumstances, both the Chief Justice and the Full Court of Hong Kong held that they had power to order the company to be wound up in that colony. They found a precedent for so holding in *In re Russian Bank for Foreign Trade* (2), where Maugham J., as he then was, ordered a winding-up in this country of a Russian bank which had a branch office in this country but had been dissolved by Russian legislation. But, in truth, no precedent was required to establish the power of the Supreme Court of Hong Kong to make such an order. The power was expressly conferred on it by s. 313, sub-s. 2, of the Companies Ordinance, 1932. As the company had ceased to exist, it had necessarily ceased to carry on business in the Colony, and in such circumstances the sub-section in terms empowers the court to wind it up notwithstanding that it has been dissolved and ceased to exist by virtue of the law of the Republic of China. That the court rightly exercised the power so conferred on it is abundantly clear. There are valuable assets formerly belonging to the company that are still in Hong Kong, and it is essential in the interests both of the former shareholders and of such creditors of the company as there may be that those assets should be protected and distributed among those who may be found to be entitled to them. This can only be done by means of a winding-up order.

For these reasons their Lordships are of opinion that this

(1) [1933] A. C. 289, 297.

(2) [1933] 1 Ch. 745.

J. C.
1941

DAIREN KISEN KABUSHIKI KAISHA v. SHIANG KEE.

appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the respondents' costs of the appeal.

Solicitors for appellants: *Waltons & Co.*
Solicitors for respondents: *Reid Sharman & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* BARNARD AND ANOTHER . . . . . APPELLANTS;

1941

July 7, 10, 11, 31.

AND

GORMAN . . . . RESPONDENT.

False imprisonment — Harbouring uncustomed goods — "Offender"— Suspected offender—Customs Consolidation Act, 1876 (39 *&* 40 *Vict. c.* 36), *s.* 186.

Sect. 186 of the Customs Consolidation Act, 1876, provides that "every person who shall . . . . knowingly harbour, keep, or "conceal, or knowingly permit or suffer, or cause or procure to be "harboured, kept, or concealed, any prohibited, restricted, or "uncustomed goods . . . . with intent to defraud Her Majesty "of any duties due thereon . . . . shall for each offence forfeit "either treble the value of the goods, including the duty payable "thereon, or one hundred pounds, at the election of the Com-"missioners of Customs; and the offender may either be detained "or proceeded against by summons":—

Held, that the word "offender" in the section includes a person who is suspected on reasonable grounds to have committed the offence and, therefore, a person so suspected, though in fact not guilty, may be detained.

Decision of the Court of Appeal [1940] 2 K. B. 570 reversed.

Bowditch v. *Balchin* (1850) 5 Ex. 378; *Trebeck* v. *Croudace* [1918] 1 K. B. 158; *Isaacs* v. *Keech* [1925] 2 K. B. 354 discussed.

APPEAL from a decision of the Court of Appeal (1).

The respondent, Gorman, was a ship's steward in the steamship *British Freedom* which arrived at Dingle Jetty, Liverpool, on July 4, 1938. She was boarded by the appellants, preventive officers of customs, who obtained from the master a customs list duly executed, being a declaration signed by the master, officers and members of the crew as to what dutiable goods they had in their possession as their private property. The list was signed by the respondent and purported to show that he had no cigars in his possession. Subsequently, an assistant preventive officer in "rummaging" the ship, found concealed under a mattress of the bunk in an unoccupied state rooma

(1) [1940] 2 K. B. 570.

**Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD WRIGHT, LORD ROMER and LORD PORTER.

box of cigars, on which duty had not been paid and which had not been declared. In respect of this, inquiries were made and at 10.30 A.M. on July 5 the appellants detained the respondent at Dingle Jetty, took him to a police station, and gave him into custody on a charge of knowingly harbouring uncustomed goods with intent to defraud His Majesty of the duties thereon, contrary to s. 186 of the Customs Consolidation Act, 1876 (1). The police detained Gorman in custody until 6.40 P.M. when he was released on bail. The charge against him was heard on July 6 and 7 by the Liverpool stipendiary magistrate who, after hearing the case for the prosecution, a submission by the respondent's solicitor and the evidence of the respondent, dismissed it, stating that he thought there was a real doubt of which the respondent ought to have the benefit. Thereafter, the respondent brought an action against the appellants in the Liverpool Court of Passage claiming damages for false imprisonment and malicious prosecution. The judge ruled that s. 186 of the Customs Consolidation Act, 1876, authorized the arrest of any person whom the officers believed on reasonable grounds to be guilty, and held on the facts that there were reasonable grounds for their belief. He, accordingly, dismissed the claim for false imprisonment and also the claim for malicious prosecution, and the latter claim was not further pursued.

The Court of Appeal, while unanimously holding that the officers had reasonable grounds for their belief that the respondent had committed an offence, by a majority (MacKinnon L.J. dissenting) allowed the appeal and directed judgment to be entered for the present respondent for 25*l.* damages for false imprisonment, holding that, on the true construction of s. 186, the word "offender" was confined in its application to a person who had in fact committed an offence. MacKinnon L.J. considered that "offender" in s. 186 could be taken to include a suspected offender. The appellants appealed to this House.

Sir Donald Somervell A.-G., *Valentine Holmes* and *H. P. J. Milmo* for the appellants. The question is whether the respondent can succeed in his claim for damages for false imprisonment where, as we contend, the appellants had reasonable cause to believe that an offence had been committed by him. The word "offender" in s. 186 must include a suspected offender. When a power of arrest is conferred by statute Parliament obviously intends to impose a corresponding duty to exercise it in proper cases. The only test to be applied to ascertain whether that power should or should not be exercised is on the facts as known at the material time to the officer who is given the power to arrest. In *Trebeck* v. *Croudace* (1) it was decided that s. 12 of the Licensing Act, 1872, which enacts that "every person . . . . who is drunk "while in charge on any highway . . . . of any carriage . . . . "may be apprehended and shall be liable to a penalty," empowered the arrest of a person who was believed on reasonable grounds to be committing the offence at the time he was arrested. In that case Swinfen Eady L.J. said (2) that "the "statute confers a power of immediate arrest, and obviously "intends that it should be acted upon at once, and without "waiting to obtain a warrant . . . . The nature of the offence "mentioned in s. 12 [of the Licensing Act, 1872] shows, in "my opinion, that the legislature intended the authority to "apprehend to apply where the circumstances are such as to "enable an honest belief upon reasonable grounds to exist "that the offence is being committed by the person being "apprehended . . . . In my judgment the power to apprehend, "conferred by s. 12 of the Act of 1872, extends to authorize "apprehension of persons honestly and upon reasonable "grounds believed to be committing the offence at the time "when they are arrested." The principle there stated applies to the present case. This power of arrest is conferred because some public interest will be defeated if the power is not exercised. In *Isaacs* v. *Keech* (3) the question arose under the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), which, by s. 28, provides that every person who, to the obstruction, annoyance or danger of the residents or passengers in any street, commits any one

---

(1) Sect. 186, so far as material, is set out in the headnote.

---

(1) [1918] 1 K. B. 158.

(2) Ibid. 164.

(3) [1925] 2 K. B. 354.

H. L. (E.)
1941
BARNARD
v.
GORMAN.

of certain offences, shall be liable to a penalty or imprisonment "and any constable . . . . shall take into custody, without "warrant, and forthwith convey before a justice any person "who within his view commits any such offence." It was held that, to entitle a constable to take a person into custody without a warrant under that section, it was not necessary that the person should be in fact committing the offence, provided that the constable honestly and on reasonable grounds believed that he was committing it. Bankes L.J. there said (1) that "the interest of the public . . . . requires "that for the maintenance of order and safety there should "be an immediate interference with persons committing certain "offences. . . . I think, however, that the whole trend "of authority has been to put a uniform construction upon "enactments giving power to arrest without a warrant a "person found committing an offence, and to hold that what "the legislature has in mind is not a mere power to arrest the "person ultimately found guilty of the offence, but is a power "to be exercised by the proper authority of acting at once "on an honest and reasonable belief that the person is "committing the particular offence." In *Ledwith* v. *Roberts* (2) some observations were made about *Trebeck* v. *Croudace* (3) to the effect that the principle there enunciated should be confined within narrow limits. If the present respondent's contention is sound an officer must always act at his peril. In *Bowditch* v. *Balchin* (4) it was said that a police constable of the city of London had no power under 2 & 3 Vict. c. xciv., City of London Police Act, 1839, to take a person into custody without a warrant merely on suspicion that he had committed a misdemeanour. If s. 186 of the Customs Consolidation Act, 1876, is not construed so that the word " offender " includes a person suspected of having committed an offence whom it is proposed to charge therewith, the section is not of much value.

Levy K.C. and *Turner-Samuels* for the respondent. "Offender " in s. 186 of the Customs Consolidation Act, 1876, can only mean a person who has in fact committed an offence

(1) [1925] 2 K. B. 360.
(2) [1937] 1 K. B. 232.
(3) [1918] 1 K. B. 158.
(4) (1850) 5 Ex. 378.

within the section. Involving as it does the liberty of the subject, the question is one of vital importance, and if the contention of the Attorney-General is accepted it will open a very wide door to cases under this as well as under many other Acts dealing with substantially similar matters. In legislation of this kind, words should be given their literal meaning and the term "offender" should be regarded as descriptive only of a person who has been guilty of an offence. The Oxford Dictionary defines the term thus: "One who offends, who "transgresses a law, or infringes a rule or regulation. In law, "one who commits an offence." If Parliament had intended that a wider meaning should be attributed to the word it should have been enacted specifically. Where, in other sections of the Act, a wider power is intended, it is given specifically: see, for example, s. 184, where an officer is empowered to act if he has good reason to suppose that a person has uncustomed goods about his person, but there the point is not the same as that which arises under s. 186. No wider meaning has ever been given to "offender" in s. 186 than that which it ordinarily bears. The legislature deliberately omitted from s. 186 the provision as to the power to detain on suspicion. The Attorney-General's contention involves the insertion of words in the relevant section and that cannot be done, the language being, as it stands, so clear as to exclude the introduction of any words.

The House took time for consideration.

1941. July 31. VISCOUNT SIMON L.C. My Lords, the principal question involved in this appeal is whether preventive officers of His Majesty's Customs and Excise are authorized by s. 186 of the Customs Consolidation Act, 1876, to detain a person whom they believe on reasonable grounds to have committed an offence under that section, or whether, though acting on reasonable grounds, they are liable in damages to the person detained in an action for false imprisonment if the complainant has not actually committed the offence. There is a subsidiary question whether, on the facts of this case, the preventive officers had reasonable grounds for their belief. I will postpone dealing with this second question, since, if s. 186 on its correct construction confers no authority to detain a suspected person unless he has actually committed the offence, the question whether the preventive officers had reasonable grounds for their action would not arise.

His Lordship stated the facts already set out, and continued: Sect. 186 of the Customs Consolidation Act, 1876, is a very long section which makes it an offence (inter alia) for anyone to import into the United Kingdom any goods liable to duty, the duties for which have not been paid or secured, and goes on to prohibit various forms of dealing with such goods without the authority of the proper officer of the customs, including, for example, "knowingly harbouring, keeping or concealing such "goods with intent to defraud Her Majesty of any duties "thereon," etc. Although this section describes various offences in different ways, the substance of the matter is that it makes it an offence to deal with goods at the port of import in such a way as to evade duties of customs. The section ends with the provision that every person who comes within the prohibitions of the section shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or 100*l.*, at the election of the Commissioners of Customs "and the offender may either be detained or "proceeded against by summons."

The main issue, therefore, is whether the "offender" in the phrase last quoted must be one who has actually committed the offence (which is the view of Scott L.J. and Clauson L.J.), or whether, in its collocation, the word covers also a person who is believed on reasonable grounds to have committed an offence under the section when in fact he has not committed it, this being the view of MacKinnon L.J. and also of the learned presiding judge of the Liverpool Court of Passage.

The question is a very serious one, for, on the one hand, it is rightly stressed that the liberty of the subject is involved, and if an innocent man is detained under official authority his personal freedom is for the time being interfered with, even though he may be treated with all consideration and may, in fact, have suffered little from being in temporary custody. On the other hand, if officers of customs cannot detain a man who is coming off a ship and whom they suspect on reasonable grounds of endeavouring to defraud the customs, but must either let him go and rely on a subsequent summons being effectually served on him, or, if not, must arrest him at their own risk, the working of our customs law is likely to be seriously impeded, and the question would arise whether it did not require to be amended. Our duty in the matter is plain. We must not give the statutory words a wider meaning merely because on a narrower construction the words might leave a loophole for frauds against the revenue. If, on the proper construction of the section, that is the result, it is not for judges to attempt to cure it. That is the business of Parliament. Our duty is to take the words as they stand and to give them their true construction, having regard to the language of the whole section, and, as far as relevant, of the whole Act, always preferring the natural meaning of the word involved, but none the less always giving the word its appropriate construction according to the context.

Approaching the problem in this spirit, I confess that I think that the correct solution can be reached without reference to the decided cases to which we were referred, though I will, out of respect to the arguments addressed to the House and to the judgments below, refer to these cases in a moment. The final words of the section run as follows : "and the offender "may either be detained or proceeded against by summons." If we separate these alternatives and consider the second of them, the provision, therefore, is that the offender may be proceeded against by summons. In this connection "the "offender" cannot possibly be construed as limited solely to the man who is actually guilty of the offence. Whether "the "offender" is guilty of the offence charged will only be determined at the hearing. The summons accuses him of an offence, and it remains to be ascertained whether the accusation is justified. It is plain, therefore, that the "offender" who may be summoned must include an innocent person who is wrongfully suspected of having committed the offence. But, if that is so, how can "the offender" have a different meaning when the first alternative is considered? Here again the detention is preliminary to an accusation, unless, indeed, satisfactory explanations are offered, and it is right to let the suspected person go. I cannot think that in a sentence which uses the words "the offender" only once and then provides for his alternative treatment, the word has a different meaning with a different content according to the alternative adopted.

I arrive at this conclusion, and, indeed, see no possible way of avoiding it, on the construction of s. 186 itself. But it is not immaterial to observe that there are other sections in the statute in which the word "offender" must (as counsel for the respondent admitted in the argument before us) be given a similar extension of meaning. Thus, in s. 197, on an information being preferred before a justice against any person for an offence against the Customs Acts, the justice may, if there is reason for thinking that such person is likely to abscond, "grant his warrant to bring such offender before him," etc. "Offender" in that sentence plainly means a person charged with an offence, and not necessarily a person who is guilty. Sect. 206 affords an equally plain instance. So does s. 221, and there are several others.

The fact is that the word "offender" has both a narrower and a wider meaning (rather like the word "reus" in Latin). It may have the stricter meaning of one who is guilty of an offence, but it also sometimes has the meaning of a person who is under accusation of having committed an offence. I do not think it would be an abuse of language for a magistrate engaged in a juvenile court to describe his work as that of trying "young offenders," but that would not mean that every boy and girl who came before him was guilty. MacKinnon L.J., in his dissenting judgment, suggests by way of analogy the double meaning of that curious word "culprit," and refers to its origin. I trust that I may be forgiven the digression if I remind your Lordships that the word "culprit" appears to arise from an abbreviated entry which used to be made on the record of a criminal court engaged in trying a prisoner for felony or treason. The prisoner at the bar was asked how he pleaded to the indictment, and on his saying "not guilty," if the prosecutor joined issue, this was recorded in the words "culpabilis: prest," that is to say "the prosecution says you "are guilty and is ready to prove it." The words were abbreviated in the form "cul: prit." The clerk of the court then asked the prisoner "How wilt thou be tried ? ", and the prisoner replied "By God and the country," the last word meaning the jury. (In the old days the clerk of assize, when addressing the jury after it had been sworn and before trial commenced, told the jury that the prisoner had been arraigned and on his arraignment had pleaded not guilty "and for trial "has put himself upon God and the country, which country "you are," etc.) It has been suggested that the abbreviation "cul: prest," or "cul: prit," though really only a record of joinder of issue, came to be understood to be a word addressed to the prisoner, and hence the modern word "culprit." (1) It is, perhaps, some excuse for this excursus that the word "culprit" is undoubtedly sometimes used to mean the person guilty of a crime and sometimes (as in the illustration above) to mean the person accused of being guilty, and is, therefore, another example of a word of narrow or wider import according to the context in which it is found.

We were referred to three reported cases in which the question arose whether the language of the legislature in authorizing arrest could cover a case where a bona fide mistake had been made. In *Trebeck* v. *Croudace* (2), the driver of a motor car in a public thoroughfare was arrested by a police constable under s. 12 of the Licensing Act, 1872, which confers on the police the power to apprehend a person in charge of a carriage on a highway who is drunk. The driver was not in fact drunk, although he was reasonably suspected of being so. The Court of Appeal held that the constable's power to apprehend extended to cover a person wrongly, but reasonably, suspected, mainly on the ground that the nature of the offence, which might well endanger the public, showed that this wider construction was justified. In *Isaacs* v. *Keech* (1) a Divisional Court, consisting of Bankes L.J. and Scrutton L.J., felt bound by *Trebeck* v. *Croudace* (2) to put this wider construction upon s. 28 of the Town Police Clauses Act, 1847. In the course of his judgment Bankes L.J. said: "I think, however, "that the whole trend of authority has been to put a uniform "construction upon enactments giving power to arrest without "a warrant a person found committing an offence, and to "hold that what the legislature has in mind is not a mere "power to arrest the person ultimately found guilty of the "offence, but is a power to be exercised by the proper authority "of acting at once on an honest and reasonable belief that the "person is committing the particular offence." In *Ledwith* v. *Roberts* (3), the Court of Appeal held that an action for false imprisonment succeeded when a constable arrested the plaintiffs without warrant under the Vagrancy Act, 1824, and where the persons arrested were not in fact within the description of suspected persons or reputed thieves. Greene L.J. (as he then was) pointed out that Bankes L.J.'s proposition, which I have quoted above, appeared to go a great deal further than what was said in *Trebeck* v. *Croudace* (2) and to lay down a principle of construction applicable to all cases where a statute gives power to arrest without a warrant. As I have said, I do not find it necessary, for the purpose of reaching my conclusion in the present appeal, to pronounce upon these earlier decisions. My own view, however, is that, when the question arises whether a statute which authorizes arrest for a crime should be construed as authorizing arrest on reasonable suspicion, that question has to be answered by examining the contents of the particular statute concerned rather than by reference to any supposed general rule of construction.

---

(1) This is the explanation in Blackstone's Commentaries iv. 339, though some of his later editors have doubted it. See, however, Murray's (Oxford) Dictionary sub voce "Culprit" where a learned note, including earlier references, seems to confirm Blackstone's view. The old forms are to be found in "the Office of the Clerk of Assize ". . . . together with the Office of "the Clerk of the Peace," a rare book in Lincoln's Inn Library with no author's name, the second edition of which appeared in 1682.

(2) [1918] 1 K. B. 158.

On the first point, therefore, this appeal, in my opinion,

(1) [1925] 2 K. B. 354, 360.
(2) [1918] 1 K. B. 158.
(3) [1937] 1 K. B. 232, 257.

succeeds, and the only question left is whether, although the appellants had statutory authority to detain an innocent person if he is reasonably suspected of the offence, there was in this particular case no reasonable cause for so acting. On this issue every judge before whom the present case has come has reached the conclusion that there was reasonable cause. I am of the same opinion. The box of cigars had been bought by the respondent when the ship was at Rangoon and was kept by him in his own quarters until after the ship arrived at Liverpool. When the respondent put his signature to the Customs List number 142 the box of cigars was still in his custody. He made no mention of it, but it was found hidden under the mattress in another room when the ship was "rummaged" next day. The story that the cigars were the subject of an agreement of sale with another member of the crew was apparently regarded with suspicion by the presiding judge of the Court of Passage. He said: "I had the "plaintiff (i.e. the present respondent) under observation in the "witness box for a considerable time and he made a most "unfavourable impression. As a judge of fact I could not "accept his account . . . . If this story was not accepted, "the defendants (i.e. the present appellants) had reasonable "grounds for believing that the cigars were his property and "in his possession when he signed the declaration, and, "therefore, reasonable grounds for believing that he had "committed the offence." There is, in my opinion, no good reason why this House should reverse the conclusion of fact unanimously reached in both the courts below.

I move that this appeal be allowed. There will be no order as to costs in this House, as the Crown has very properly agreed (since this is a case of general importance, and the respondent is a poor man) to pay the costs of all parties in any event and not to seek to disturb the order as to costs made in the Court of Appeal.

LORD THANKERTON. My Lords, I find myself in complete agreement with the opinion just delivered by my noble and learned friend on the Woolsack. He has fully and clearly expressed the reasons for his conclusion, and with those reasons I agree.

LORD WRIGHT. My Lords, this appeal raises an important question which affects the liberty of the subject, but I think that the answer depends on the construction of a few words in s. 186 of the Customs Consolidation Act, 1876. This section is one giving powers of arresting or detaining persons in circumstances in which at common law no power of arresting or detaining would exist. It is the duty of the court in construing sections of this nature to balance the two conflicting principles, the one that the liberty of the subject is to be duly safeguarded; the other that the expressed intention of the legislature to give powers of arrest beyond those existing at common law should not be too narrowly construed. But in the end the issue falls to be ascertained by deciding what is the correct meaning to be attributed to the words of the particular section which gives the power, read according to the recognized rules for construing statutes.

Sect. 186, the full terms of which are before the House, concludes with the words "and the offender may either be "detained or proceeded against by summons." The section deals with a variety of offences which may be committed to defraud His Majesty of duties payable on goods being imported, or which consist in being knowingly concerned in any fraudulent evasion or attempt at evasion of any duty of customs. The section provides that for each such offence the person concerned shall forfeit either treble the value of the goods, including the duty payable thereon, or one hundred pounds, at the election of the Commissioner of Customs.

The respondent, the steward on the *British Freedom*, which arrived at Liverpool on July 4, 1938, was detained on the following day under s. 186 of the Act by the appellants, who were preventive officers, and taken to the police station, Dale Street, Liverpool, and there given into custody on a charge of knowingly harbouring certain uncustomed goods, namely, cigars, with intent to defraud the Crown of the duties due on them. He was kept under arrest for eight hours and then released on bail to answer the charge. The charge was heard on July 6, 1938, before the stipendiary magistrate, who dismissed it, stating that he thought there was a real doubt, of which the respondent ought to have the benefit. The respondent then brought an action in the Liverpool Court of Passage against the appellants claiming damages for malicious prosecution and false imprisonment. The presiding judge, Sir Francis Kyffin Taylor K.C., dismissed both claims. The appellants did not, as they might have done, seek to reopen the issue of fact whether the respondent did actually commit the offence, although in these proceedings and between these parties the issue was not concluded by the magistrate's decision. The presiding judge, accordingly, dealt with the case on the footing that the respondent was innocent, but found that the appellants had reasonable grounds for believing, as it was conceded that they did believe, that he had committed the offence. The Court of Appeal unanimously agreed that this finding of the learned judge was correct. It has been again contested before your Lordships, but again without success. There were abundant grounds to justify the finding. There was no appeal against the dismissal of the respondent's claim for malicious prosecution.

The argument on behalf of the respondent has been that "offender" in the section means actual offender, and that as the respondent has been found innocent, and, therefore, was not an offender, his detention by the appellants was outside the authority conferred by the section and was wrongful. The decision of the learned judge against the respondent on this issue was reversed by the Court of Appeal by a majority. MacKinnon L.J., however, dissented, on the ground that "offender" in the section means "a suspected offender" and cannot be limited to mean "one who has in fact committed "an offence." He added that "the defendants must, of "course, establish that they had reasonable grounds for their "suspicion," which in this case they had. I agree with his conclusion.

Arrest for a misdemeanour without a warrant, whether by a private person or by a police officer or by any public functionary, may be either under a power conferred by common law or by statute, but if it is not made under such a power it is wrongful. In the case of a misdemeanour there is at common law no power to arrest without a warrant, unless for a breach of the peace being committed in the presence of the person arresting or the renewal of which is reasonably apprehended, or where there is escape and fresh pursuit after the breach is committed. There is, apart from this common law power, no right to arrest without a warrant in the case of a misdemeanour unless that power is expressly given by statute. The offence in question here is a misdemeanour. For purposes of the present case, if the power is given at all, it is given by the last twelve words of s. 186. The word "offender" is there used only once: "the offender may either be detained or proceeded against "by summons." The section authorizes two alternative courses with a view to enforcing or seeking to enforce the penalties prescribed in the earlier part of it. I think it is impossible to construe "offender" otherwise than as having one and the same meaning in this short sentence, or as meaning one thing when used in connection with detaining the person and another thing when used in connection with proceeding against him by summons. If "offender" means an actual offender, with regard to detention, it must mean an actual offender in regard to proceeding by summons, but so to read it in respect of the authority to take summary proceedings seems to my mind to involve a manifest absurdity. The object of proceeding by summons is to ascertain if the man is guilty. It would be unreasonable to enact that a man may be proceeded against by summons only if he is actually guilty, so that the procedure would be without jurisdiction if on the hearing of the summons it was found that he was innocent. "Offender" here must, accordingly, I think, mean, "One who is suspected of or charged with the offence." The provision is clearly intended for the purpose of bringing the charge to investigation. If, however, "offender" has that meaning when read with "proceeded against," etc., and when summary procedure is being authorized, it must have the same meaning when applied to the authority to detain.

Mr. Levy, in his candid argument, conceded that the word "offender" as used in different sections in the statute was not a word to be understood as having a fixed or technical significance, but must take its colour from the context in which it is found. It cannot, however, be accepted that "offender" is so chameleon-like as to change its meaning within the limit of a dozen words. If, as I have shown, it means "suspected "offender" in the one connection, it must mean the same in the other connection. It was quite natural for the draftsman to use "offender" in that sense when it would seem that the sense in which it was used was clear. In fact, he has obviously done so in other sections of the same Act. Thus in s. 197 "offender" can only mean a person charged with the offence. The section provides: "When it shall appear to such justice "that such person is likely to abscond, such justice may in "lieu of issuing a summons for his appearance, grant his "warrant to bring such offender before him." The opening words of the section supply the definition of "offender" in that section. The section begins "Any person brought "before any justice for any offence [that is, charged with any "offence] against the Customs Acts." "Offender" thus means "suspected offender." The charge may be dismissed. He cannot properly be called an offender in the strict sense until he is convicted. In s. 221, I think "offender" is also clearly used in the sense of accused or suspected offender. The section provides for the justice arresting or holding the "offender" to bail, and bringing such "offender" before him, and on his being so brought requiring him to give security to appear for the hearing of the case. There again the detention is precautionary and is preparatory to ascertaining whether he has committed the offence or not. On the other hand, in s. 190 the word "offender" is qualified by "being duly "convicted," and this refers to an actual offender, and in s. 233 also "offender" is clearly from the context used in the sense of actual or convicted offender. In s. 186, on the contrary, it is obvious that the word "offender" describes a person who has not yet been tried and in law, though suspected, is still innocent.

H. L. (E.)
1941
BARNARD
v.
GORMAN.
Lord Wright.

I need not multiply instances from the Customs Consolidation Act, 1876, showing that the word "offender" is a neutral term conveniently used in drafting not in a strict or technical sense but taking from the particular context the appropriate meaning either of actual offender or of suspected or accused offender. I thus here define the ambit of the power to detain from the actual language of the statute and not from any implication. I am not prepared to construe the power to detain by holding that "offender" in the relevant section means actual offender and then reading in by implication as a further definition or extension of the power to detain words such as "the offender (i.e. the actual offender) or such person "as the officer reasonably and honestly believes to be an "offender." There are statutes where power to arrest without warrant on reasonable cause to suspect is given in express terms, but in general I think such an extension of the express power merely by implication would be unjustified. As Pollock C.B. said in *Bowditch* v. *Balchin* (1), "In a case in "which the liberty of the subject is concerned, we cannot go "beyond the natural construction of the statute." In that case the statute 2 & 3 Vict. c. xciv. gave to a member of the city of London police force power to arrest without warrant all loose, idle and disorderly persons whom he should have good cause to suspect of having committed or intending to commit any felony, misdemeanour or breach of the peace, and it was held by the Court of Exchequer that the words "loose, idle "and disorderly persons" were overriding words. In effect, the condition precedent to the power was that the man arrested fell within the description. It was only if that condition was satisfied that it became competent to act on the further grounds of suspicion or actual conduct in the case. It was contended there that it was enough if the constable had good cause of suspicion, even though the man arrested did not come within the specified category of persons. Alderson B. answered: "If the legislature had so intended, they would "have inserted the words 'and all other persons.'" It is always dangerous to construe words in one statute on the analogy of the construction adopted in the case of another statute. If it were necessary I should need to consider whether the decision of a Divisional Court in *Isaacs* v. *Keech* (1) is consistent with that in *Bowditch* v. *Balchin* (2), or whether the words "common prostitute or night walker loitering and "importuning passengers for purpose of prostitution" do not involve two conditions, (1.) that the woman should belong to the particular category of persons, (2.) should be loitering and importuning. The legislature may well have thought that when they give the power to arrest without warrant for particular conduct, the power should be limited to the case of particular categories of persons whose previous conduct or character or reputation renders them peculiarly open to suspicion, as in *Bowditch* v. *Balchin* (2). The Divisional Court in *Isaacs* v. *Keech* (1) regarded themselves as bound by the decision of the Court of Appeal in *Trebeck* v. *Croudace* (3). That, however, was a different case. There was there no overriding condition that the person arrested should answer to a general description. The power to arrest depended on the particular acts done or conduct exhibited. It was a power (inter alia) to arrest without a warrant every person found drunk while in charge of any carriage on a highway. While I do not wish to express any final opinion on a case not now before me, I am not prepared to dissent from the actual decision of the Court of Appeal that the arrest was justified if the constable reasonably believed that the man was drunk, even though eventually the magistrates dismissed the charge. As at present advised, I think that "drunk" in that context means "apparently drunk." The constable must act on what he sees at the moment, and should be held to be justified if the man's appearance and behaviour are those of a drunken man. Instant action is demanded by the needs of public safety which would be endangered if an intoxicated person were left in charge of a vehicle on the road. Swinfen Eady L.J. (4) said that the nature of the offences specified required the construction that the authority to apprehend applied where

---

(1) 5 Ex. 378.

(1) [1925] 2 K. B. 354.
(2) 5 Ex. 378.
(3) [1918] 1 K. B. 158.
(4) Ibid. 165.

H. L. (E.)
1941
BARNARD
v.
GORMAN.
Lord Wright.

the circumstances were such as to enable an honest belief on reasonable grounds to exist that the offence was being committed by the person being apprehended. In the particular classes of offences there considered, I may add that the constable must act on external appearances, and a reasonable inference from these appearances, and a word like "drunk" may well be construed in that context as contrasted with its meaning in a statute imposing penalties for being drunk while in charge of a vehicle, such as a motor car, to refer merely to external appearances, even though the appearances may be afterwards held to have been misleading. Bankes L.J. said (1) that action must of necessity be founded on the circumstances of the moment and mainly probably on such information as the senses of a police constable, his sight and hearing, convey to him.

But I must not be taken to be assenting to the proposition of Bankes L.J. in *Isaacs* v. *Keech* (2), that a power to arrest without warrant a person found committing an offence is in general or prima facie a power to be exercised by the proper authority of acting at once on an honest and reasonable belief that the person is committing the particular offence. In every case the power to arrest without warrant must be justified either by the common law or by statute. In the latter case the power must be found in the words of the particular statute relied on, construed according to ordinary principles. Thus, a decision on one statute may afford no real guidance in deciding what is the effect of another statute. This general rule was emphasized by the Court of Appeal in *Ledwith* v. *Roberts* (3), where it was said that it was essential to scrutinize the particular statute and see what precisely are the powers to arrest given and what are the conditions of its exercise. In substance, it was there held that, on the construction of the statutory provisions in question, it was a condition of the power to arrest that the persons arrested should in fact belong, and not simply be believed to belong, to the classes of persons specified. The particular enactments in question are not on this occasion before the House and their

(1) [1918] 1 K. B. 167.

(2) [1925] 2 K. B. 360.

(3) [1937] 1 K. B. 232.

H. L. (E.)
1941
BARNARD
v.
GORMAN.

construction has not been the subject of argument, so that I abstain from expressing any final opinion on the decision.

I think that this appeal should be decided simply on the language of s. 186. As I construe the language of the section, the detention was, in my opinion, justified. In my opinion, the appeal should be allowed.

LORD ROMER. My Lords, the question to be decided on this appeal is undoubtedly one of considerable importance, for it is concerned with the liberty of the subject. It is nevertheless, as I see it, a very short and a very simple one, for it is concerned with the meaning to be attributed to merely one word in one section of the Customs Consolidation Act, 1876. The section is s. 186, and the word is " offender."

I need not repeat the section in full. It is sufficient to say that it enacts that every person who shall commit any of certain specified offences shall for each such offence incur the forfeiture or penalty therein prescribed and it concludes as follows: " and the offender may either be detained or pro-"ceeded against by summons." The question that your Lordships are asked to determine is whether the word "offender " as there used means a person who has committed one of the specified offences or whether it means a person who is suspected of having committed one. That the ordinary meaning of the word " offender " is a person who has in fact offended must be conceded, but the context in which a word is found may be, and very often is, strong enough to show that it is intended to bear other than its ordinary meaning, and such a context is in my opinion to be found in the present case. For the section provides that the offender may be proceeded against by summons, and to give the word "offender " in this connection its ordinary meaning would be to render the provision nonsensical. It would mean that before issuing the summons the magistrate would have to decide that the offence had in fact been committed. The principle of " verdict first and trial afterwards " might, as on one occasion did that of " sentence first and verdict after-"wards," find some support in the Court of Wonderland, but it is not one that is regarded with favour in this country. Furthermore, if the offender failed to appear on the hearing of the summons, any warrant issued for his arrest would have been issued illegally should the defendant's innocence subsequently be established. In this last mentioned event, moreover, any proceedings on the summons taken in his absence would be a mere nullity and could be successfully challenged by him. It seems clear, therefore, that when the section provides that the "offender" may be proceeded against by summons, the word "offender" means a person suspected of having committed an offence. That was the view of Scott L.J. and so far I agree with him.

My Lords, it very often happens that a word is used in more than one section of an Act of Parliament and that it bears one meaning in one section and a different meaning in another. It may even happen that a word is used in different senses in the same section of an Act. But to arrive at the conclusion that the noun "offender," which appears only once in the section under consideration, has one meaning when applied to the verb "detain" and a different meaning when applied to the verb "proceed against by summons" requires a feat of mental gymnastics of which I personally am quite incapable.

It only remains to deal with one other matter. It is said that when the appellants detained the respondent they had no reasonable or probable ground for suspecting that he had committed an offence. If this could be shown to be the fact, the respondent would be entitled to succeed. For in that case the appellants would not have been using the power of detention conferred on them by the section. They would have been misusing it, and could not, therefore, justify the detention of the respondent. I am, however, satisfied that on this question, on which the Court of Appeal were unanimous in affirming the learned presiding judge of the Liverpool Court of Passage, the appellants are entitled to succeed. The story that they were told by the respondent and Rioch was one that was calculated to excite the suspicion of the least suspicious officer of His Majesty's customs. It was obviously one that required the closest investigation. The magistrate who subsequently did investigate it was, apparently, left in some doubt as to the truth of the story, but in the end he gave the respondent the benefit of the doubt. That the respondent was in fact innocent of the charge brought against him cannot now be questioned, but that the appellants had reasonable and probable cause for suspecting the contrary seems to me to be quite clear.

My Lords, for these reasons I would allow this appeal, and I concur in the motion that is before the House.

LORD PORTER (read by LORD THANKERTON). My Lords, the essential facts in this case are of the shortest. The appellants, two customs preventive officers, arrested the respondent on July 4, 1938, for alleged breaches of s. 186 of the Customs Consolidation Act, 1876. He was brought before a magistrate, charged with knowingly harbouring uncustomed goods, and acquitted. He then brought an action against the appellants for damages for false imprisonment, and your Lordships have to determine whether he can succeed in that action.

Two questions only were argued: (1.) Had the appellants any right to arrest the respondent? (2.) If they had such a right, has it been established that they had reasonable and probable cause for believing that the respondent had committed the offence with which he was charged? It was admitted on behalf of the respondent that the appellants did in fact genuinely believe that he had committed the offence, and conceded on behalf of the appellants that the right of arrest which they claimed could not legally be exercised unless they had reasonable and probable cause for their belief.

Of the two questions argued before your Lordships one, the second, is a question of fact, and it has already been held by two courts, namely, the Court of Passage in Liverpool, in which the action was brought, and the Court of Appeal, that there was reasonable and probable cause for the appellants' belief. It would require strong grounds to make your Lordships' House differ from this conclusion. The learned judge of the Court of Passage saw and heard the evidence of the respondent, and found himself unable to accept the account of the incidents leading up to the arrest given by the witness, of whom he formed a most unfavourable impression. No further evidence was called, but certain matters on which the appellants relied as giving them reasonable and probable cause for believing the respondent to be guilty were set out in the particulars of the defence and were admitted by the respondent. On that evidence both the judge of first instance and the Court of Appeal took the view that the appellants had reasonable and probable cause for their belief. The respondent and an apprentice named Rioch were said to have been implicated in trying to import two boxes of cigars without paying duty. From the admitted facts and the witnesses' evidence it appears (1.) that the cigars had been in the respondent's possession until after the customs form was signed; (2.) that the time at which he and the apprentice spoke of their being handed over by the former to the latter was long after that form had been completed by both; (3.) that that form contained no entry showing that either of them was in possession of cigars, and (4.) the cigars were ultimately found hidden under the mattress in one of the cabins. The whole story was a suspicious one, and the magistrate who heard the case gave, as he said, the respondent the benefit of the doubt. There was, in my opinion, ample evidence for the view held by both courts, and I think that they were fully justified in their finding.

The second question depends solely on the true construction of s. 186 of the Act. The relevant portion of that section may for my purpose be limited to the words "every person who shall "knowingly harbour any uncustomed goods shall for each such "offence forfeit either treble the value of the goods, including "the duty payable thereon, or 100*l*., at the election of the "Commissioners of Customs, and the offender may either be "detained or proceeded against by summons."

"Offender" is the word used, and the argument on behalf of the respondent is that "offender" means, and can only mean, one who actually committed the offence, and that the respondent, having been found not guilty, was not an offender and could not be held lawfully to have been arrested unless it was alleged and proved in the civil proceedings that he really had committed the offence. The appellants, however, did not attempt in the civil proceedings to controvert the magistrate's finding, and, therefore, the question to be determined is: Are customs officers entitled to arrest a person whom they honestly and with reasonable and probable cause suspect of having committed an offence against s. 186, or is the right of arrest confined to a case where the person arrested actually committed the offence? The majority of the Court of Appeal thought it meant the latter. In their view the word "offender" in its ordinary meaning means a guilty person, and they found nothing, or at any rate nothing sufficiently conclusive, in the collocation of the word in the section to cause them to modify that meaning.

My Lords, they were no doubt strengthened in their resolve to construe the section strictly by the consideration that it dealt with the liberty of the subject and that that liberty should not lightly be put in jeopardy. No one of your Lordships is less anxious than the Court of Appeal that the greatest weight should be given to such a consideration, and, if I thought that the word "offender" could only bear the meaning which has been attributed to it, or even if I thought it could fairly be so construed in s. 186 of the Customs Consolidation Act, I should unhesitatingly support that view.

I do not think, however, that "offender" in all cases necessarily means one who has committed an offence. No doubt, that is the prima facie meaning, and, if there was nothing in its surroundings to suggest another interpretation, the primary meaning should be adopted, but the word is capable also of meaning a person charged with or suspected of having committed an offence or, to put it more broadly, of meaning an alleged offender. I do not think one would feel that the expression "the offender was committed for trial" is an impossible phrase, yet I do not imagine that that phrase would convey to the hearer the impression that the accused man was necessarily guilty.

The difficulty of construing the word in s. 186 in a sense other than that of a suspected person is that the same word is used in the same sentence in reference to one to be proceeded against by summons, as well as in reference to one liable to

H. L. (E.)
1941
BARNARD
v.
GORMAN.
Lord Porter.

arrest. Can it have been intended that procedure by summons should only be used against a guilty person and that preventive officers could safely proceed under the section only if they could do what in fact they could never do with certainty, namely, guarantee a conviction? The representatives of the respondent maintained that the section was only meant for use in plain cases, and that so used the risks were negligible, but customs officials are executive officers, not judges, and must bring the case to a court for it to determine the guilt or innocence of the accused, unless indeed the offender consents to a compromise.

A more natural explanation is that "offender" means a suspected person, and I should so interpret it in s. 186, even if that section stood alone. If this interpretation be adopted the accused person would still have the protection against arrest which all suspected persons have by law, namely, that those who take them into custody must have reasonable and probable cause for their action.

But the section does not stand alone, and the appellants' contention is fortified by the use of the word "offender" in other sections which show that in a proper collocation the word can, and in the Act does, mean "suspected person." Sections 190, 197, 199, 202, 206, 221 and 229 are all illustrations of this use. Scott L.J. recognized this fact, and, indeed, refers to the difficulty of construing the same word in the same section in two different ways, but he felt constrained to give it its prima facie meaning in the one connection even though it must bear a different meaning in the other. For myself, I do not think it justifiable to interpret the word in two separate ways. In my view, the wording of s. 186 alone shows that arrest is permitted provided the person arrested is with reasonable and probable cause suspected of an offence, but if support for this view is required the rest of the Act affords many instances of a similar use of the word.

Three cases were quoted to your Lordships as laying down some general principles which were said to be of assistance in construing the section under consideration. In the first, *Trebeck* v. *Croudace* (1), s. 12 of the Licensing Act, 1872, which

(1) [1918] 1 K. B. 158.

enacted that "Every person . . . . who is drunk while in "charge on any highway . . . . of any carriage may be "apprehended," was interpreted as meaning that every person who is honestly and with reasonable and probable cause believed to be drunk may be apprehended. In *Isaacs* v. *Keech* (1) a similar construction was adopted in the case of the arrest of certain persons under s. 28 of the Town Police Clauses Act, 1847, which gives power to arrest without warrant persons who "within view of a constable" commit certain offences. The only general principle for which these cases furnish authority is that in construing an Act of Parliament it is proper to regard the general purpose of the Act. The application of this principle to the particular incidents of the cases quoted is immaterial for consideration in the present case. Nor indeed do I gain much assistance from the third case referred to. *Ledwith* v. *Roberts* (2) turned on the meaning of s. 4 of the Vagrancy Act, 1824, as amended by the Prevention of Crimes Act, 1871, and the Penal Servitude Act, 1891, which enacted that "every suspected person or reputed thief frequenting "any street with intent to commit felony shall be deemed a "rogue and vagabond," and on s. 6, which provided that "it shall be lawful for any person whatsoever to apprehend "any person who shall be found offending against this Act." The actual decision was that the arrest could only be justified if the person arrested was a member of the class specified, and though some of the observations made in the judgments delivered go further, they do not seem to me to be essential to the decision or to lay down any general principles which would assist your Lordships in the present case. All three seem to turn on the particular wording of the section then under review and in no way to provide matter for consideration in the present case.

I should allow the appeal and restore the judgment of the learned judge.

Appeal allowed.

Solicitor for appellant: *Sir Alfred Brown, Solicitor for Customs and Excise.*

Solicitors for respondent: *Silverman & Livermore.*

(1) [1925] 2 K. B. 354.

(2) [1937] 1 K. B. 232.

[PRIVY COUNCIL.]

JABER ELIAS KOTIA AND ANOTHER . APPELLANTS ;

AND

KATR BINT JIRYES NAHAS . . . . RESPONDENT.

J. C.*
1941
July 1.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE, SITTING AS A COURT OF APPEAL.

Palestine — Succession — Lebanese subject — Mulk land — Devolution — " National law of the deceased "—Law of the situation of the land—Palestine law applicable—Ottoman law—Palestine Order in Council, No. 1282 *of* 1922, *arts.* 46, 51, 58, 59, 64—*Succession Ordinance,* 1923 (*c.* 135 *of the Laws of Palestine,* 1933), *ss.* 2, 3, 4, 11.

The effect of s. 4 (iii.) of the Succession Ordinance, 1923, of Palestine, is that where the deceased was neither a Palestinian citizen nor a member of one of the religious communities his mulk land, whether he were a foreigner or not, is to be distributed in accordance with his national law, and where his national law imports the law of the domicil or the law of the situation of the land, the law so imported is to be applied. The phrase " the " national law of the deceased " in the section is to be construed not as referring to the law which the courts of the nationality of the deceased would apply in the case of its own national domiciled in its own country with regard (where the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the propositus, having regard to what, in their view, is his domicil (if they consider that to be relevant), and having regard to the situation of the property in question (if they consider that to be relevant).

Where, therefore, the evidence established that the national law of a Lebanese subject, domiciled and resident in the Lebanese State, who died intestate and childless owning certain mulk land in Palestine, imported the law of the situation of the land, the law of Palestine as applicable to the case of a Palestinian citizen, which in accordance with the relevant portion of s. 4 of the Succession Ordinance, 1923, provided for the application of the provisions of the Ottoman law set out in the schedule to the Succession Ordinance, governed the succession to the deceased's mulk land, and, accordingly, the appellants, the two brothers of the deceased, took a one-quarter share each, and the deceased's widow, the respondent, a one-half share.

**Present :* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD ROMER, SIR GEORGE RANKIN, and CLAUSON L.J.

J. C.

1941

JABER ELIAS KOTIA
v.
KATR BINT JIRYES NAHAS.

Principle in *Casdagli* v. *Casdagli* [1918] P. 89, 106; [1919] A. C. 145, 151, applied.

The phrase " Eastern (Orthodox) Community " in the first schedule to the Succession Ordinance refers to the community in Palestine adhering to the Eastern (Orthodox) Church, and a person domiciled and resident outside Palestine does not fall within the description of a member of the Eastern (Orthodox) Community as used in the ordinance merely because he is in fact an adherent of the Eastern (Orthodox) Church.

Abdullah Bey Chedid v. *Tenenbaum* (1933) Pal. L. R. 1920–33, 831, 843, referred to.

Judgment of the Supreme Court of Palestine, sitting as a Court of Appeal (1938) 5 Pal. L. R. 518, affirmed.

APPEAL (No. 58 of 1939) from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal in Jerusalem (October 31, 1938), which set aside an order of the District Court of Jaffa (July 31, 1938).

The following statement of the facts and of the relevant provisions of the law of Palestine are taken substantially from the judgment of the Judicial Committee.

The appellants were the brothers of Ibrahim Elias Kotia, who died intestate and childless on December 7, 1937, a national of and domiciled and resident in the Lebanese State. The respondent was the widow of the deceased. The brothers claimed that certain " mulk " land (i.e., land possessed in full ownership: see *Tsinki* v. *King's Advocate* (1)) of the deceased situated near Jaffa, in Palestine, ought to be divided in the proportions of nine twenty-fourths to each brother and six twenty-fourths to the widow, that was, in accordance with the Sharia Moslem law prevailing in the Lebanese State. The widow, on the contrary, claimed that the land in question ought to be divided in the proportions of one-quarter to each brother and one-half to her, proportions adopted in cases of intestacy by the Ottoman law, and, according to the arguments of the widow, applicable to the present case by virtue of the law of Palestine. The District Court of Jaffa ordered the issue of a certificate of succession in relation to the property in question and the movables of the deceased in Palestine in accordance with the contention of the brothers, thus giving one-quarter to the widow. The Supreme Court of Palestine (Manning, Copland and Khayat JJ.), on an appeal by the widow, directed the order of the district court to be set aside and an order to be substituted directing a certificate of succession to issue giving (in accordance with the widow's contention) a one-half share in the mulk land to the widow and a one-quarter share to each of the two brothers. The brothers appealed.

---

(1) [1920] A. C. 743, 746.

The following provisions of the law of Palestine were relevant to the matters in dispute: By the Palestine Order in Council, 1922, Article 46. "The jurisdiction of the Civil "Courts shall be exercised in conformity with the Ottoman "law in force in Palestine on November 1, 1914, and such later "Ottoman Laws as have been or may be declared to be in "force by Public Notice, and such Orders in Council, Ordinances "and Regulations as are in force in Palestine at the date of the "commencement of this Order, or may hereafter be applied or "enacted; and subject thereto, and so far as the same shall "not extend or apply, shall be exercised in conformity with "the substance of the common law, and the doctrines of "equity in force in England, and with the powers vested in "and according to the procedure and practice observed by "or before Courts of Justice and Justices of the Peace in "England, according to their respective jurisdictions and "authorities at that date, save in so far as the said powers, "procedure and practice may have been or may hereafter "be modified, amended or replaced by any other provisions. "Provided always that the said common law and doctrines of "equity shall be in force in Palestine so far only as the circum-"stances of Palestine and its inhabitants and the limits of "His Majesty's jurisdiction permit and subject to such "qualification as local circumstances render necessary."

Article 51. "Subject to the provisions of Articles 64 to 67 "inclusive jurisdiction in matters of personal status shall be "exercised in accordance with the provisions of this Part "by the Courts of the religious communities established and "exercising jurisdiction at the date of this Order. For the "purpose of these provisions matters of personal status mean

J. C.
1941
JABER ELIAS KOTIA
v.
KATR BINT JIRYES NAHAS.

"suits regarding marriage or divorce, alimony, maintenance, "guardianship, legitimation and adoption of minors, inhibition "from dealing with property of persons who are legally "incompetent, successions, wills and legacies, and the administration of the property of absent persons."

Article 58. "The Civil Courts shall exercise jurisdiction "over foreigners, subject to the following provisions":—

Article 59. "For the purpose of this part of the Order "the expression 'foreigner' means any person who is a "national or subject of a European or American State or of "Japan, but shall not include: (i.) Native inhabitants of a "territory protected by or administered under a Mandate "granted to a European State. (ii.) Ottoman subjects. "(iii.) Persons who have lost Ottoman nationality, and have "not acquired any other nationality. The term 'subject' "or 'national' shall include corporations constituted under "the law of a foreign State, and religious or charitable bodies "or institutions wholly or mainly composed of the subjects "or citizens of such a State."

Article 64. "(i.) Matters of personal status affecting "foreigners other than Moslems shall be decided by the "District Courts, which shall apply the personal law of the "parties concerned in accordance with such regulations as "may be made by the High Commissioner, provided always "that the Courts shall have no jurisdiction to pronounce a "decree of dissolution of marriage until an Ordinance is passed "conferring such jurisdiction. (ii.) The personal law shall "be the law of the nationality of the foreigner concerned unless "that law imports the law of his domicile, in which case the "latter shall be applied. (iii.) The District Court, in trying "matters of personal status affecting foreigners, shall be "constituted by the British President sitting alone. In "trying matters of personal status affecting foreigners other "than British subjects, the President may invite the Consul "or a representative of the Consulate of the foreigner concerned "to sit as an assessor for the purpose of advising upon the "personal law concerned. In case of an appeal from a "judgment in such a case the Consul or representative of the

"Consulate of the foreigner concerned shall be entitled to sit "as an assessor in the Court of Appeal."

By the Palestine (Amendment) Order in Council, 1935, the following article was substituted for the original article 59 as from April 1, 1935: "59. For the purpose of this part "of the Order, the expression 'foreigner' means any person "who is not a Palestinian citizen."

Under powers contained in the Order in Council, the Succession Ordinance, 1923, was established on March 8, 1923. The material provisions of that ordinance, as appearing in the current Revised Ordinances, are as follows:

Sect. 2. "In this ordinance, unless the context otherwise "requires— . . . . 'foreigner' means any person who is a "foreigner within the meaning of Article 59 of the Palestine "Order in Council, 1922; 'immovable property' includes *miri* "land and *mulk* land; . . . . '*mulk* land' includes all heritable "land or interests therein, not being *miri* land; . . . . 'the "'Ottoman Law' means the Provisional Law relating to the "succession to immovable property dated 3 Rabi ul Awal, "1331, as set forth in the second Schedule to this Ordinance. ". . . ."

PART II.—JURISDICTION OF CIVIL COURTS.

Sect. 3. "(1.) The civil courts shall have exclusive juris"diction in all matters relating to the succession to, ... "every Palestinian citizen and any other person, not being a "foreigner; Provided that such citizen or other person was "not at the date of his death either a Moslem or a member of "one of the religious communities. (2.) They shall also have "exclusive jurisdiction in all cases in which a dispute arises "as to the succession to, or the will of, a foreigner, other than "a Moslem. . . . ."

Sect. 4. "Subject to the provisions of s. 21, a civil court "shall distribute successions within its jurisdiction according "to the following rules: (i.) Where the deceased was a member "of one of the religious communities and was not a foreigner, "the provisions of s. 11 shall apply. (ii.) Where the deceased "was a Palestinian citizen and was not a member of one of "the religious communities, the provisions of the Ottoman

J. C.
1941
Jaber Elias Kotia
v.
Katr Bint Jiryes Nahas.

"law shall apply, subject to any testamentary disposition "made by the deceased. (iii.) Where the deceased was either "a foreigner or, not being a foreigner, was neither a Palestinian "citizen nor a member of one of the religious communities, the "following rules shall apply: (*a*) *mulk* land and movables "of the deceased shall be distributed in accordance with the "national law of the deceased; . . . . (*c*) where the national "law imports the law of the domicile or the religious law or "the law of the situation of an immovable, the law so imported "shall be applied: Provided that, if the national law imports "the law of the domicile and the latter provides no rules "applicable to the person concerned, the law to be applied "shall be his national law."

Sect. 11. "In the administration and distribution of the "estate of a deceased person who was a member of any of the "religious communities and was not a foreigner, the civil "courts shall apply the following rules to regulate the distribution of his *mulk* and movable property: . . . . (*d*) in "default of testamentary dispositions, or in so far as such "dispositions do not extend, the property shall be distributed "in accordance with the provisions of the Ottoman law "contained in the second Schedule to this Ordinance."

1941. April 30; May 1. *Pritt K.C.* and *Quass* for the appellants. The deceased was a foreigner within the meaning of the Palestine Order in Council, 1922. [Reference was made to arts. 46, 51, 52, 58, 59 and 64 of the order.] A succession suit is a matter of personal status, and, therefore, art. 64 applied and the district court had to apply "the personal "law of the parties concerned." The party concerned is the deceased, and not the claimants. By art. 64 (ii.) the personal law shall be "the law of the nationality of the "foreigner concerned." The question which arises is whether the "law of the nationality" of the deceased means the municipal law of Lebanon, or the law which the Lebanese courts would apply to the deceased's succession in respect of this land in Palestine, i.e., the law of Palestine. It is submitted that it means the municipal law of Lebanon. In

J. C.
1941

JABER ELIAS KOTIA
v.
KATR BINT JIRYES NAHAS.

all cases, except where the law of the domicil is imported, the law of the nationality means the municipal law of that nationality as it would be applied in the national courts. [*In re Annesley. Davidson* v. *Annesley* (1) was referred to.] There is no need to consider the Succession Ordinance, 1923, because, first, the order in council prescribes completely what court is to have jurisdiction and in the present case what law is to be applied, and, secondly, if the ordinance made any different provision, so far as it was inconsistent with the order in council the latter would prevail. If, however, the appellants have to rely on the Succession Ordinance, they are within s. 4 (iii.) (*a*). In Lebanon Moslem Sharia law is applied in matters of succession regardless of the situs of the property. In article 64 of the order in council or in the corresponding section of the Succession Ordinance, the national law of the deceased means the law which the Lebanese courts would apply to Lebanese citizens in respect of property in Lebanon. *In re Ross. Ross* v. *Waterfield* (2), and *In re Askew. Marjoribanks* v. *Askew* (3), show that the construction of the order in council and, if necessary, of the Succession Ordinance, should be approached with the view that there is nothing unusual in such legislation applying to the case of a foreigner who has land in Palestine the law of his nationality in the narrow sense of what the courts of his country would have decided about succession if the land had been in their own country.

Le Quesne K.C. and *Gerald Gardiner* for the respondent. We are here concerned only with s. 4 of the ordinance, and the question for decision is purely one of construction of that section. While s. 4 (iii.) of the ordinance provides for the application of the national law of the deceased, it does not do so unconditionally, but subject to the condition that the national law is not to be applied if it imports the lex situs. If, therefore, it is found, as in the present case it is, that the national law of the deceased imports the lex situs, s. 4 (iii.) can and should be treated as if it did not mention the national law. The law

(1) [1926] Ch. 692, 708.
(2) [1930] 1 Ch. 377, 388, 401–2, 404.
(3) [1930] 2 Ch. 259, 269, 275, 278.

J. C.
1941
JABER ELIAS KOTIA
v.
KATR BINT JIRYES NAHAS.

of Lebanon imports the law of the situation of the property, that is, the Palestinian law, which applies the Ottoman law, and accordingly the respondent is entitled to a one-half share in the deceased's mulk land in Palestine.

Pritt K.C. replied.

July 1. The judgment of their Lordships was delivered by CLAUSON L.J. who, after stating the facts and the relevant statutory provisions as set out above, continued: Although the certificate issued under the order of the district court extended to movables in Palestine, no question was raised either in the appellate court or before their Lordships with regard to the deceased's movables in Palestine. Before their Lordships the argument was confined to the question of succession to the deceased's immovables in Palestine, and it is this question alone which their Lordships have considered.

Schedule I. to the Ordinance of 1923 enumerates the recognized religious communities, one of which is the Eastern (Orthodox) Community. Schedule II. sets out the Ottoman law relating to the inheritance of immovable property. It is sufficient to state that the effect of it is that on the succession to a childless male leaving a widow and two brothers the widow's share is one-half, and each of the brothers takes one-quarter.

The deceased appears to have belonged to the Eastern Orthodox religion, but it was not shown that he belonged to the Eastern (Orthodox) Community in Palestine. Indeed, the appellants in their case submitted that he plainly did not. Their Lordships feel no doubt that the phrase "Eastern "(Orthodox) Community" appearing in the first schedule to the Succession Ordinance, 1923, refers to the community in Palestine adhering to the Eastern (Orthodox) Church, and that a person domiciled and resident outside Palestine does not fall within the description of a member of the Eastern (Orthodox) Community as used in the ordinance merely because he is in fact an adherent of the Eastern (Orthodox) Church. That this is the correct view of the phrase is implied in the language used by Lord Tomlin in delivering their

J. C.
1941
JABER ELIAS KOTIA
v.
KATR BINT JIRYES NAHAS.

Lordships' judgment in *Abdullah Bey Chedid* v. *Tenenbaum* (1).

Before the district court there was evidence of the Lebanese law which, in the opinion of the appellate court (from which their Lordships see no reason to differ) showed that, in the case of immovable property situated outside the Lebanon, the Lebanese courts would apply the law of the country where the immovable property was situated, that is, in this case, the law of Palestine. In the district court the learned judge held that the law to be applied to the succession not only to the movables but also to the immovables in question (namely, mulk land situated in Palestine) was the national law of the deceased, i.e., the Lebanese law. He treated the evidence as establishing that the national law in Lebanon is Moslem Sharia law, and he, accordingly, ordered a certificate of succession to issue giving six shares to the widow and nine shares to each of the brothers. In arriving at this decision the learned judge appears (as pointed out by the Court of Appeal) to have ignored the evidence. It was argued at one time before their Lordships by counsel for the appellants that they ought to have a further opportunity of questioning this evidence, but it does not appear that any application for leave to tender further evidence was made either to the district judge or to the appellate court, and their Lordships must accordingly deal with the evidence as it stands.

Before the appellate court, and again before their Lordships, it was argued that, for the purposes of the application of the Succession Ordinance, the deceased must not be treated as a foreigner. It was suggested that he was excluded from the definition of foreigner in art. 59 of the order in council of 1922 since he was, it was said, a native inhabitant of a territory (that is, the Lebanon) administered under a mandate granted to a European State. Whether or not this might have been so had the order in council remained in its original form, their Lordships see no reason to differ from the view of the appellate court that, since the amending order in council of 1935 came into force, the term "foreigner" in the Succession Ordinance, 1923, must be read with reference to the new art. 59

---

(1) (1933) Pal. L. R. 1920–33, 831, 843.

J. C.
1941
Jaber Elias Kotia
v.
Katr Bint Jiryes Nahas.

substituted for the former art. 59 by the amending order in council. This question is, however, of no importance in view of the fact that the deceased was not, and was not suggested by either side to be, a Palestinian citizen. The effect of s. 4 (iii.) of the ordinance is that, where (as in the present case) the deceased was neither a Palestinian citizen nor a member of one of the religious communities, his mulk land, whether he be a foreigner or not, is to be distributed in accordance with the national law of the deceased, and where the national law imports the law of the domicil or the law of the situation of the land, the law so imported is to be applied. On the evidence the appellate court, in their Lordships' opinion, rightly, held that the national law of the deceased (that is, the Lebanese law) imported the law of the situation of the land. The appellate court stated the result to be that the law applicable is the law of Palestine, and added that, in accordance with that law, it is not disputed that the widow is entitled to a half share.

Their Lordships agree in the conclusion thus reached by the appellate court, but, in view of the fact that counsel for the appellants in fact disputed before their Lordships that, in this particular case, the law of Palestine was the Ottoman law, which admittedly would give the widow a half share, it is desirable to explore the matter somewhat further. It was argued, and it is true, that the law of intestate succession to mulk land in Palestine is not uniform. The distribution is governed, in the case of mulk land owned by a Palestinian citizen who was not a member of one of the religious communities specified in the ordinance, by Ottoman law by virtue of s. 4 (ii.) of the ordinance. It is governed in the case of mulk land owned by a member of one of the religious communities, who was not a foreigner, by Ottoman law by virtue of s. 11 (*d*) of the ordinance. It is governed in the case of mulk land owned by a deceased person who neither was a Palestinian citizen nor a member of one of the communities by the national law of the deceased. It was then argued that the only reasonable construction to be placed on the phrase "the national law of the deceased" in s. 4 (iii.) (*a*) of the ordinance is "the law which the courts of the nationality "of the deceased would apply to the intestate succession to "land of their own nationals in their own country," that is, in the present case the Sharia law, which would give the widow only a quarter share, and that, unless this construction is placed upon the ordinance, there results a "circulus "inextricabilis," the Lebanese law referring the matter back to the local law, the local law referring the matter back to the law of nationality, and so on ad infinitum.

Their Lordships would hesitate long before construing the words "the national law of the deceased" as meaning "the law "which the courts of the nationality of the deceased would "apply to the intestate succession to land belonging to their "own nationals situate in their own country." Such a construction would construe the ordinance as deliberately cutting across the principle recognized by Scrutton L.J. in *Casdagli* v. *Casdagli* (1) (a dissenting judgment which was, however, approved by the House of Lords on appeal in the same case (2)); by Luxmoore J. in *In re Ross. Ross* v. *Waterfield* (3); and by Maugham J. in *In re Askew. Marjoribanks* v. *Askew* (4)); which their Lordships venture to state as follows: that in the English courts phrases which refer to the national law of a propositus are prima facie to be construed, not as referring to the law which the courts of that country would apply in the case of its own national domiciled in its own country with regard (where the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the propositus, having regard to what in their view is his domicil (if they consider that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant). Their Lordships, accordingly, approach the question of the construction of s. 4 of the ordinance on the footing that this view of the prima facie meaning of the phrase "the national law of the deceased" is (as in their Lordships' opinion it is) the correct one. On

(1) [1918] P. 89, 106.
(2) [1919] A. C. 145, 151.
(3) [1930] 1 Ch. 377.
(4) [1930] 2 Ch. 259.

J. C.
1941
Jaber Elias Kotia
v.
Katr Bint Jiryes Nahas.

examining the whole of the section, their Lordships, so far from finding grounds for modifying their prima facie view, find confirmation of it in the wording of clause (*c*) of the section, which clearly contemplates that the national law to which reference is made may import the law of the domicil or the law of the situation of an immovable. If the phrase "the national law of the deceased" is to be construed (contrary to their Lordships' view) to mean "the law which the courts "of the deceased's nation would apply in the case of its own "national domiciled in its own country in relation to land in "its own country," it is not easy to account for the reference to the possible importation of the law of the domicil or the law of the situation of an immovable.

As regards the suggestion made by counsel for the appellants that it was an objection to the construction of the section which their Lordships prefer that it would result in a "circulus "inextricabilis," their Lordships feel no difficulty. It must be borne in mind that the primary question for their Lordships is: What is the law of Palestine as to the devolution on the death of the deceased intestate of this particular piece of land? To this, as their Lordships have pointed out above, the answer is that the enacted law of Palestine provides, on its true construction, that the devolution of this particular piece of land, in the circumstances stated, is to be such as the courts of the nationality of the deceased (namely, the Lebanese courts) would determine it to be if this question were before them. (It may be observed that in the present case there is no question of the presence in the Lebanese law of any provision of a character which the Palestinian court might properly consider itself precluded from applying. Examples of such possible provisions are given by Maugham J. in *In re Askew. Marjoribanks* v. *Askew* (1), but need not be considered for the purposes of the present case.) The second question is one of fact, namely, what would the Lebanese courts determine to be the devolution of this particular piece of land in the circumstances stated? The evidence shows that the Lebanese court would determine that the Palestine law, being the law of the

(1) [1930] 2 Ch. 259, 275.

J. C.
1941

JABER ELIAS KOTIA
v.
KATR BINT JIRYES NAHAS.

situation, governs the matter. In other words, the law of Palestine, as applied to this particular case, is found to be that although the deceased is a national of the Lebanese State, there is nothing in the law of the Lebanese State to interfere with the application to the case of the law of Palestine, being the law of the situation of the property in question. The Palestine Court must (in accordance with the views expressed by Scrutton L.J. in *Casdagli* v. *Casdagli* (1)) be taken to accept the renvoi and apply its own law, as applicable to the case of a Palestinian citizen, which, whether the case falls within sub-s. (i.) or sub-s. (ii.) of s. 4 of the Succession Ordinance, 1923 (and it must fall within one or the other), provides for the application of the provisions of the Ottoman law.

One further point remains. It was urged by counsel for the appellants that there cannot be said to be any law of the situation of the property. It was said that the Succession Ordinance, 1923, provides such a law for mulk land belonging to a member of one of the specified religious communities, and for like land belonging to a Palestinian citizen, but that, as regards land belonging to any one else, whether a foreigner, or, not being a foreigner, a person who was neither a Palestinian citizen nor a member of one of the specified religious communities, there is only the law enacted by s. 4 (iii.), and that the words "the law of the situation" of an immovable, as used in that sub-section, cannot be construed as repeating the section over again, but must refer either to something else or to something which does not exist. In view of the opinion expressed above it follows that the alleged gap does not exist, but, in any event, it appears to their Lordships, as at present advised, but without deciding the point, that any such gap as is alleged would be filled by the operation of art. 46 of the Palestine Order in Council, 1922.

In the result, their Lordships are of opinion that the decision under appeal correctly ordered a certificate of succession to be issued giving to the widow of the deceased twelve shares out of twenty-four in the mulk property in Jaffa. Their Lordships will humbly advise His Majesty that the appeal be dismissed.

(1) [1918] P. 89, 106.

J. C.
1941
JABER ELIAS KOTIA
v.
KATR BINT JIRYES NAHAS.

The appellants will be ordered to pay the respondent's costs of the appeal.

Solicitors for appellants: *T. L. Wilson & Co.*
Solicitors for respondent: *Wylie Patterson & Herring.*

[HOUSE OF LORDS.]

KING FEATURES SYNDICATE, INCORPORATED, AND ANOTHER . . } APPELLANTS ;

AND

O. AND M. KLEEMAN, LIMITED . . RESPONDENTS.

H. L. (E.)*
1941
Mar. 11, 13; 14, 17; *May* 27.

Copyright—Infringement—Sketches and drawings—Comic figure as central feature—Publication in American and Canadian newspapers over series of years—Licences granted to make and sell dolls and toys representing figure—Registrable design—Similar dolls imported and sold without consent of copyright owners—Reproduction in three dimensions of substantial part of original work—Copy of licensee's doll—Whether copyright owner lost right to prevent reproduction—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 1, 22, *sub-s.* 1*—Patents and Designs Acts,* 1907 *to* 1932.

Between 1929 and 1937 a large number of sketches and cartoons, of a type known as "comic strips," were produced by E.C.S. and published in American and Canadian newspapers, all embodying as their central feature a grotesque figure dressed in nautical costume, having easily recognized peculiarities, and described and popularly known as "Popeye, the Sailor." The figure having also been popularized by reproduction in English newspapers, the plaintiffs, who claimed copyright in the sketches, granted licences to British firms to make and sell dolls, mechanical toys, brooches, and other articles featuring the figure of "Popeye." The defendants applied for a licence, but refused to accept the plaintiffs' terms. They afterwards imported and sold large consignments of similar dolls, toys, and brooches under the name of "Popeye" dolls, etc. The plaintiffs claimed an injunction to restrain the defendants from infringing their copyright, and damages for infringement and conversion. The defendants denied infringement and relied on s. 22 of the Copyright Act, 1911 :—

Held, that the defendants' dolls and brooches were reproductions in a material form of the plaintiffs' original artistic work and were not the less so because they were copied, not directly from any sketch of the plaintiffs, but from a reproduction in material form derived directly or indirectly from the original work, and that s. 22 of the Copyright Act, 1911, did not operate to bring an existing copyright to an end or to absolve pirates from the offence of piracy.

Decision of the Court of Appeal [1940] Ch. 806 reversed.

---

* *Present :* VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

H. L. (E.)
1941
KING FEATURES SYNDICATE, INC.
v.
O. & M. KLEEMAN, LD.

APPEAL from a decision of the Court of Appeal (1) reversing the decision of Simonds J. (2).

The plaintiffs were King Features Syndicate, Inc., an American corporation, and Frank Cecil Betts, the personal representative of Elzie Crisler Segar, an American artist, who died on October 13, 1938. Segar was the author of a large number of drawings or cartoons depicting as the central figure a grotesque and fictitious character known as " Popeye," or " Popeye, the Sailor." These cartoons had appeared in the form of " comic strips " running to very large numbers, which appeared in newspapers and journals in the United States and in Canada, and afterwards in this country. The first strip of drawings was published simultaneously in the United States and Canada in the New York Evening Journal for January 17, 1929. It was admitted that any copyright in these drawings or cartoons was vested in the plaintiffs or one of them. The figure and get-up of " Popeye " having become popular, the plaintiffs in or before 1937 granted licences to certain persons and companies to manufacture and sell in the United Kingdom dolls, mechanical toys, and brooches simulating the figure of " Popeye." Large quantities of these articles having been sold, the defendants, O. & M. Kleeman, Ld., who were manufacturers and vendors of toys, approached the plaintiffs asking for a licence to manufacture articles of the kind. The terms on which the plaintiffs were prepared to grant the licence were not acceptable to the defendants, who thereupon proceeded without obtaining any licence, to obtain delivery from Winckler & Co., of Kobe, of large quantities of brooches invoiced to them as " Popeye brooches " and of celluloid mechanical figures and plaster dolls invoiced to them under such titles as " Cell. Popeye," " Plaster filled Popeye," " Clay filled figure Popeye," or " Mechanical Popeye toy."

The plaintiffs claimed an injunction to restrain the defendants from infringing their copyright by the importation of dolls, brooches and toys embodying a similar figure and sold under the name " Popeye dolls," etc., and the plaintiffs also claimed damages. The defendants denied infringement, and contended by way of defence that the plaintiffs had lost the right to restrain them from reproducing the figure in the cartoons by reason of s. 22 of the Copyright Act, 1911 (1).

---

(1) [1940] Ch. 806.

(2) Ibid. 523.

Simonds J. held—(*a*) that the plaintiffs' copyright had been infringed by the reproduction of the sketches; (*b*) that the dolls and toys sold by the defendants reproduced a substantial part of the plaintiffs' work, although in fact copied directly from articles made by the plaintiffs' licensees; (*c*) that the plaintiffs' sketches were not "designs" capable of being registered as such under the Patents and Designs Acts, 1907 to 1932, and were, therefore, not excepted from artistic copyright by virtue of s. 22 of the Copyright Act, 1911. The Patents and Designs Acts offered protection, like the Copyright Act, not for an abstract idea, but for its embodiment in concrete form, and the sketches contained no features of shape, configuration, pattern or ornament applied to an article by any industrial process or means within the definition of "design" under the former Acts. On appeal, the Court of Appeal held that the defendants' dolls (but not their brooches) were reproductions in a material form of the plaintiffs' original artistic work and not the less so because they were not copied directly from any sketch of the plaintiffs, but from a reproduction in material form derived directly or indirectly from the original work, and, therefore, but for s. 22 of the Copyright Act, 1911, they would constitute infringement of the plaintiffs' copyright. But it was further held by Scott and Clauson L.JJ., Luxmoore L.J. dissenting, (*a*) that as the plaintiffs' licensees had reproduced in a material form a figure taken from one of the plaintiffs' sketches (which would have entitled the licensees to register the figure as a new and original design under the Patents and Designs Acts) and had used the design as a model or pattern to be multiplied by an industrial process, s. 22 of the Copyright Act, 1911, prevented that Act from applying to the design: and (*b*) that the plaintiffs had, therefore, lost the right otherwise conferred on them by the Act of 1911, to prevent other persons from making a like reproduction and their action, accordingly, failed.

---

(1) Copyright Act, 1911, s. 22: "(1.) This Act shall not apply to "designs capable of being registered under the Patents and "Designs Act, 1907, except designs "which, though capable of being "so registered, are not used or "intended to be used as models or "patterns to be multiplied by any "industrial process."

The plaintiffs appealed to this House.

Harman K.C. and *Gahan* for the appellants. The respondents have reproduced a substantial part of the appellants' design, thus infringing the latter's rights. Even a colourable imitation is within the mischief aimed at: see s. 25 of the Copyright Act. *Pytram, Ld.* v. *Models (Leicester), Ld.* (1) is distinguishable. If not, we submit that it was wrongly decided. In this case the Court of Appeal held that because the appellants had granted licences to other persons, the act of the respondents was not an infringement. That cannot be right. The brooch made by the respondents reproduces the distinctive features and characteristics of the appellants' design, and that is an infringement which entitles the appellants to an injunction: see per Lord Halsbury in *Walter* v. *Lane* (2); and *Brooks* v. *Religious Tract Society* (3).

Shelley K.C. and *G. S. W. Marlow* (for *A. D. Russell-Clarke*, on war service) for the respondents. To establish infringement actual copying must be established and that has not been shown. Mere similarity is not infringement, for there may well be similarity without copying, and in such a case there is no infringement: see *Walter* v. *Lane* (4). Each individual case has to be considered to ascertain whether some characteristic feature has been reproduced and that has not been shown here. There cannot be a design in the air, nor can there be one until it is shown how it is to be applied to a particular article, and if the article is different then it is a different design. A design may be registered in more than one class: *In re Clarke's Design* (5), where Lindley L.J. said: "The word "'design,' therefore, must be taken to be used in its ordinary "signification of something marked out—a plan or repre"sentation of something. The subsequent words, however,

---

(1) [1930] 1 Ch. 639.
(2) [1900] A. C. 539.
(3) (1897) 45 W. R. 476.
(4) [1900] A. C. 539, 549.
(5) [1896] 2 Ch. 38, 43.

H. L. (E.)
1941
KING FEATURES SYNDICATE, INC.
v.
O. & M. KLEEMAN, LD.

"show that this Act does not extend to all designs, but only "to such as are applicable to some article of manufacture. "This is made still plainer by s. 58, which relates to infringe-"ment of the copyright conferred by the Act." We submit that the articles here in question are not registrable inasmuch as they have no special or distinctive features of shape, etc. A person who claims a monopoly must justify his claim by some statutory provision. That has not been shown here. Sect. 22 was deliberately introduced to prevent the Copyright Act applying to cases which previously were subject to the Patents and Designs Act. Once a man desires to exploit his copyright commercially he must avail himself of the Designs Acts. The Copyright Acts do not apply to the physical thing, in this case the doll. Sect. 22 of the Copyright Act, 1911, supports our construction. They also cited *Ware* v. *Anglo-Italian Commercial Agency, Ld.* (No. 1) (1) and *Gillette Safety Razor Co.* v. *Anglo-American Trading Co., Ld.* (2).

Harman K.C. replied.

The House took time for consideration.

1941. May 27. VISCOUNT MAUGHAM. My Lords, this is an appeal from the Court of Appeal (England) who on July 8, 1940 (Scott and Clauson L.JJ., Luxmoore L.J. dissenting), reversed a judgment of Simonds J., delivered on March 25, 1940, and dismissed the action. The action was brought for alleged infringement of the appellants' copyright in certain artistic works, namely, sketches portraying a fictitious character known as "Popeye, the Sailor," by the importation and sale of certain dolls and brooches. It was admitted that copyright had at one time subsisted in sketches relied on by the appellants, and that the appellants, or one of them, was the owner of them, and it was also admitted that the respondents had imported and sold the dolls and brooches in question. It was originally contended by the respondents that neither the dolls nor the brooches constituted a reproduction in a material form of any of the sketches relied on

(1) (1922) Macg. Cop. Cas. (1917-23) 346.
(2) (1913) 30 R. P. C. 465.

and that consequently there was no infringement. Relief was granted to the appellants by Simonds J., both in respect of the dolls and the brooches. The Court of Appeal differed as to the brooches, holding that these were not a reproduction of any of the sketches. As to the dolls, the Court of Appeal held that they did constitute a reproduction of one particular sketch, but they held (by a majority) that the copyright, or at least the right to restrain infringement of it in this case, was taken away as the result of the operation of s. 22 of the Copyright Act, 1911.

The respondents were content before your Lordships to accept the view of the Court of Appeal, and they no longer contend that the dolls are not a reproduction in a material form of that sketch. They supported the view of the Court of Appeal as to the brooches, and as to the effect of the section to which I have referred.

The following facts should be stated. The said drawings were published in sets or "strips" of four or five, the first strip appearing in the New York Evening Journal on January 17, 1929. In subsequent issues of the same newspaper further strips were published at frequent intervals. Copies of each issue were publicly sold in Canada simultaneously with publication in New York, and thereby the drawings became copyright in the United Kingdom. Prior to any of the infringements alleged against the respondents the appellants had granted licences for the reproduction of the figure of "Popeye" in the form or brooches, plaster or clay-filled dolls and mechanical toys with the intention (duly carried out by the several licensees) that of each type of brooch, doll or toy more than fifty copies should be made. None of the designs, therefore, was registered under the Patents and Designs Acts, 1907 and 1919. The infringements complained of are of the drawings, and the Act relied on is the Copyright Act, 1911. For the purpose of the action the appellants selected out of the thousands of strips published as before mentioned fifty-five strips published between January 17, 1929, and January 16, 1937, and conceded that if they could not prove infringement of the copyright in one or more of the drawings in these fifty-five strips they could not establish any infringement.

Before your Lordships the respondents confined themselves to three contentions. First, they said that in any event the brooch was not an infringement. Secondly, they contended that the appellants had not proved that the licensed articles copied by the respondents had been copied from any of the drawings in the selected strips rather than from any of the other "Popeye" drawings. Thirdly—and this contention was the one which resulted in the dismissal of the action in the Court of Appeal—they said that, even if the respondents' acts would otherwise have been infringements, the appellants were debarred from any remedy which they might otherwise have had by s. 22 of the Copyright Act, which provides: "(1.) This Act shall not apply to designs capable of being "registered under the Patents and Designs Act, 1907, except "designs which, though capable of being so registered, are not "used or intended to be used as models or patterns to be "multiplied by any industrial process. (2.) General rules under "s. 86 of the Patents and Designs Act, 1907, may be made for "determining the conditions under which a design shall be "deemed to be used for such purposes as aforesaid." It should here be mentioned that the vital question arising on this section was not raised in its present form on the hearing before Simonds J., and your Lordships have not, therefore, the advantage of his opinion on the matter. In the Court of Appeal Scott and Clauson L.JJ. took the view that there was a good defence to the action under s. 22, but Luxmoore L.J. thought that the section had no further object than to prevent the application of the Act of 1911 to a work itself capable of registration as a design under the Patents and Designs Act of 1907 so as to confer artistic copyright on that work.

Before considering the effect of this section, I will deal with the other two questions raised by the respondents. The first is whether, assuming that the appellants are entitled to copyright in the drawings, the brooches are colourable reproductions in three dimensions of any substantial part of the original drawings. It is not now contended that a figure in three dimensions which reproduces an original artistic work (within the meaning of the Copyright Act, 1911) may not be an infringement of a drawing. On this point I have nothing to add to that which Simonds J. and Clauson L.J. have said. There remains the question whether the figure of "Popeye" on the brooches does or does not reproduce any substantial part of the drawings. The question is one of fact. When, as in this case, the copy or the reproduction is not exact the court must examine the degree of resemblance. It is impossible to lay down any useful test of what constitutes a copy or a colourable imitation of such a work. I think, as Lord Watson seems to have thought in the not very different case of *Hanfstaengl* v. *Baines & Co.* (1), that the language of Bayley J. in *West* v. *Francis* (2), though not always applicable, gives some assistance in determining what resemblance constitutes copying. Bayley J. said (2): "A copy is that which comes "so near to the original as to give to every person seeing it "the idea created by the original." Lord Shand, in *Hanfstaengl* v. *Baines & Co.* (3), remarked that, in comparing the works and keeping in view the idea and general effect created by the original, there was "such a degree of similarity as would "lead one to say that the alleged infringement is a copy or "reproduction of the original or the design—having adopted "its essential features and substance." Those were remarks made in reference to the Fine Arts Copyright Act, 1862, and there is in the Act of 1911 no reference to the design of the work as there was in the earlier Act. I think that makes no difference, and it seems to me that the remarks of Lord Watson and Lord Shand are applicable to the present case. Accepting those views, and not without some hesitation, I have arrived at the conclusion, agreeing with Simonds J. and differing with respect from the Court of Appeal, that the brooches, like the dolls, on the hypothesis that copyright is established, are infringements of drawing No. 3 in the set of drawings published in the New York Evening Journal on June 17, 1929.

The second contention is essentially based on a matter of

(1) [1895] A. C. 20, 27.
(2) (1822) 5 B. & Ald. 737, 743.
(3) [1895] A. C. 31.

H. L. (E.)
1941
King Features Syndicate, Inc.
v.
O. & M. Kleeman, Ld.
Viscount Maugham.

evidence. It is said that, as it had not been proved that the articles made by the appellants' licensees had been copied from the fifty-five rather than any other of the thousands of drawings by Mr. Segar, and as the respondents admitted that they had copied from the licensees' figures, and as it was not proved that all the drawings had been published in Canada simultaneously with publication in the United States, it was not established that any copyright had been infringed. This plea is not to be found in the defence and omits to notice that the respondents had formally admitted that the fifty-five strips which appeared in the New York Evening Journal were the *original* artistic work of Mr. Segar and were simultaneously published in Canada. There was prima facie evidence from mere similarity to support the view that the licensees made their figures from one or other of these drawings. The respondents, apparently, did not ask for the production at the trial of the thousands of other drawings or seek to prove that the figure of "Popeye" in the drawings subsequent to those published in the issue of the New York Evening Journal for January 17, 1929, were anything but copies or imitations of those first published. In these circumstances I agree with the learned trial judge and all the Lords Justice that this contention, which has little merit and seems to have been in the nature of an afterthought, must fail.

The main point is as to the true construction of s. 22, and here it is desirable to refer to the rule made under s. 86 of the Patents and Designs Act, 1907, and authorized by sub-s. 2 of s. 22. By r. 89, made pursuant to the sub-section, it was provided that a design should be deemed to be used as a model or pattern to be multiplied by an industrial process within the meaning of s. 22 (*a*) when the design is reproduced or intended to be reproduced in more than fifty single articles unless the articles form only a single set; (*b*) when the design is to be applied to printed paper hangings, carpets, certain textile piece goods and other articles which it is not necessary to enumerate. Before construing the section it may be useful to remember that the Copyright Act, 1911, requires no registration, and confers a right in an unpublished as well as a published work. It gives to the author a copyright which extends for the life of the author and a period of fifty years after his death. On the other hand, a (so-called) copyright in a design under the Patents and Designs Act can only be obtained by obtaining registration under the Act. It must conform to the definition of a design under s. 93, and it must at the date of registration be " a new or original design which "has not been previously published in the United Kingdom" (s. 49). The definition states that the design means only the features of shape, configuration, pattern or ornament *applied to an article.* The copyright, moreover, covers only the application of the design to articles in a class in which the design is registered, and there are thirteen such classes. Piracy of the design is in effect defined in s. 60. The point to be noted is that it is unlawful " for the purposes of sale to apply to any "article in any class of goods in which the design is registered "the design or any fraudulent or obvious imitation thereof" without the licence or written consent of the registered proprietor. Anyone may lawfully copy the registered design in the ordinary meaning of the word " copy." He may even apply it to the class of goods in which it is registered if he does not do it for the purposes of sale. He may for purposes of sale apply it to articles not in that particular class. What he may not do (except with the licence or written consent of the registered proprietor) is to apply it for the purposes of sale to any article in the class of goods in which it is registered (s. 60). The registration protects the design for a maximum period of fifteen years (s. 53).

It was evidently not the intention of the legislature when the Copyright Act, 1911, was being passed into law and the right was being given to every proprietor of copyright to reproduce his work in " any material form whatsoever " (s. 1, sub-s. 2), to give the author of a new or original and previously unpublished design, if he chose to register it, not only the right conferred on him by the Patents and Designs Act, 1907, but also the much more extensive rights which he might get in any drawing of the same design for the life of the author and fifty years thereafter. Yet, apart from special provision in the Copyright Act, such a drawing, if it or a design taken from it and applied to an article was registered under the Act of 1907, in some cases would, and in many cases might, have received protection under both Acts. It is evident that the inventor of a design intended to be used as a model or pattern to be multiplied by an industrial process must almost inevitably make a drawing or print which is an artistic work within the meaning of the Copyright Act, 1911, and clearly such a drawing or print in some cases may be a design capable of registration under the Act of 1907. On the other hand, an industrial object, whether in two or three dimensions, may well be an infringement of the artistic copyright in the preliminary drawings or prints made by the author or in the design registered under s. 49 of the Act of 1907. It is not, in my opinion, open to doubt that the main object of s. 22 was to prevent such a result, and to leave the author of a design capable of registration, if he intended to use it industrially, with no more than the rights which the Act of 1907 gave him. All the text-book writers have taken that view, which, indeed, is almost an obvious one. It is, however, possible that s. 22 has further effects, and that possibility must now be considered.

Sub-sect. 1 of s. 22 may be a little easier to understand if it is rewritten thus: "This Act shall apply to designs "capable of being registered under the Patents and Designs "Act, 1907, which are not used or intended to be used as "models or patterns to be multiplied by any industrial process. "With that exception this Act shall not apply to designs "capable of being registered under the Patents and Designs "Act, 1907." The design, it is clear, is entitled to the benefit of the Copyright Act, 1911, if it is *not used or intended to be used* as a model or pattern. (For brevity, I will omit in what follows the words "to be multiplied by any industrial pro"cess.") The questions arise: "Not used by whom? At "what time? Who is it that is not to have the intention to "use it? When is that negative to be satisfied?" My Lords, I cannot doubt that the person so referred to is the author, and that the time is the time when the design comes into existence. That, I think, is the natural meaning of the words, and attributes a reason for the introduction of a reference to the intention of some person who does not need further description. The matter is not altogether free from authority, for in *Ware* v. *Anglo-Italian Agency, Ld.* (1), my noble friend Lord Russell of Killowen (then Russell J.) expressed the opinion on a motion that the intention referred to in s. 22 must be taken to be the intention of the author of the work and be ascertained at the time of the making of the work.

The majority in the Court of Appeal, I think, have taken the view that the section has a sort of ambulatory effect, so that, if an author of a design or drawing capable of being registered has not used it or intended to use it as a model or pattern, he will obtain a copyright under the Act of 1911, but if he or a licensee at some future date, perhaps many years afterwards, uses it, or intends to use it, as a model or pattern, then s. 22 applies, with the consequence as I understand it that the Act of 1911 ceases to protect the design and (that at least is my view of the argument if pursued to its logical conclusion) the drawing which was the origin of it. I should observe here that, in my view, it is impossible to construe the section as having the limited effect of permitting the piracy of copyrights still in existence, since the section begins with the words "This Act shall not apply, etc." There seems to be no ground for holding that the Act applies in part or that it ceases to apply on the happening of a future event. The real question, however, must be whether in the event which has happened the Act has ceased to apply to *the drawings*. That it does not apply to the figures made by the licensees is in my opinion immaterial and irrelevant as soon as it is established that the respondents' figures are prima facie infringements of the drawings.

My Lords, there are reasons for thinking that s. 22 is not open to such a construction. There is nothing in the section to suggest that a copyright gained by an author under the Act is to be terminated or destroyed in whole or in part at some later date. The words "not used or *intended to be* "*used*" in the context seem to point to a condition on which a copyright under the Act of 1911 may be acquired in the first instance. It would be almost impossible to apply the section, if the copyright might be terminated or limited long after it came into existence by *the mere intention* to use the work as a model or pattern either of the author or of someone deriving some right from him. How can one apply the section if the copyright is to cease to exist or is to be limited in its extent on the formation of an undisclosed intention at a date after the copyright has come into existence? On the other hand, it does appear to be a possible view that the legislature thought that it would not be very difficult to ascertain when the author of a design (or the drawing from which the design was made) had completed his work, whether he intended it simply as a work of art or as a model or pattern to be multiplied by an industrial process—in other words whether or not he regarded it as a species of commercial enterprise. It does not seem to have occurred to the draftsman, if we may judge from the terms of the section, that the artist might have mixed intentions, or that, having created an artistic work, he or his executors or his assignees might desire at some future day to industrialize the work and to cause it to be multiplied in articles to which it was capable of being applied. I am far from suggesting that the section is an example of perfect drafting. I am content to say that I can find no words which point to the view that s. 22 is contemplating a terminable copyright.

---

(1) (1922) Macg. Cop. Cas. (1917 to 1923) 346.

The difficulties of the construction contended for by the respondents do not end there. They have to say that the copyright in the drawings under the Act of 1911 came to an end or at any rate was deprived of some of its rights at the moment when Cecil Coleman, Ld., proceeded under licence from the appellants, King Features Syndicate, Inc., to manufacture dolls or brooches representing "Popeye, the "Sailor," or formed an intention so to do. There was no registration under the Patents and Designs Act, 1907. It was admitted before your Lordships that the original drawings were not capable of being registered as designs, and it is not very clear to me that this alone is not enough to put the respondents out of court on the ground that these drawings are not within the precise words of s. 22 and that the copyright in them remains untouched. This point, however, was not relied on. It may perhaps involve too narrow a view of the section, and I shall assume for the present purpose that the section applies both to designs capable without alteration of being registered and also to drawings or the like which with slight modification can be turned into designs capable of being registered. On that basis it is said that a design could be and was in fact made by the licensee from one of the drawings and applied to an article and multiplied, and that, therefore, the Act of 1911 ceased to protect the drawing provided that the design is used in making the copy. The same result must, therefore, be taken to have followed if there had been a consent in writing to any use of the drawing for the purpose of a design to be multiplied, however limited in scope and time the consent might be. If, for example, the licence given by the author is to employ the drawing as a design for a specified book, and is used by the licensee (with consent) to obtain a registered design under the Patents and Designs Acts, he could then only obtain registration in class 2 (" Books and "bookbinding of all materials "), and he would (subject to the terms of the licence) have the exclusive right to apply the design to any article in that class. As already stated, he would have no right to restrain the application of the design to articles in any other class. It is most difficult to see why such a licence should have the result of diminishing or destroying the rights of the author to prevent infringement of his fine art copyright in the drawing under the Act of 1911. It is true that counsel for the respondents argued that the result in such a case would only be to throw open to the world the right to use the design originally protected in class 2, namely, for books and bookbinding. But that seems to me to be an impossible limit to place upon the argument, for no such limitation can be derived from the words of s. 22 and it would be impossible to apply any such a limitation in a case where there is no registration, as in the present case. The only logical contention must be that the lawful use or intended use for multiplication of the original drawing as a design by any authorized person, whether the design is registered or not, and, if registered, whatever the class in which it is registered, ipso facto has the result that the Copyright Act, 1911, automatically ceases to apply to any *design* taken from the original drawing capable of being registered under the Patents and Designs Act, 1907, including any drawing from which the design has been made. I am unable to see anything in the section which justifies so curious a result. By the Copyright Act, 1911, the legislature has thought fit to enact that during a very long term unauthorized persons can be restrained from producing or reproducing the copyright work in any material form whatsoever. The only result of giving s. 22 its most natural meaning is that this right under the Act of 1911 may continue, even though at some time after the work in question was first created the author or someone deriving title from him has thought fit to use the work or a design taken from the work as a model or pattern to be multiplied by an industrial process. This does not seem to be a very shocking result, because, after all, people are not compelled to copy the original works of others. The author is in such a case left with precisely the same rights in the original work as he had before the work was used or intended to be used as a model or pattern for multiplication, and he will not get any right to restrain a design which is a reproduction or imitation of the original work in a material form which he had not got before.

My conclusion, therefore, as to the true construction of s. 22 is the same as that at which Luxmoore L.J. arrived. I think that this appeal should be allowed. There should be an injunction to restrain the respondents from infringing the copyright of the appellants in the drawing No. 3 in the first published strip of drawings in the statement of claim mentioned by making or causing to be made without the appellants' consent articles reproducing in a material form the figure of a sailor delineated in the said drawing, or by selling the same or by way of trade exposing or offering the same for sale ;

an order for delivery up of infringing articles for destruction; and an enquiry as to what damages, if any, have been sustained by the appellants by reason of the infringement by the respondents of the appellants' copyright. The respondents should pay the costs here and below. I beg to move accordingly.

LORD RUSSELL OF KILLOWEN (read by LORD WRIGHT). My Lords, in the course of the debate it became apparent that the questions for our determination were two, and two only: namely, (1.) whether the brooches constitute a reproduction in a material form of any of the sketches of "Popeye" contained in the fifty-five strips, and (2.) whether s. 22 of the Copyright Act, 1911, affords a defence to the action.

As regards the first question, I agree with the view of Simonds J. For my purpose it is sufficient to refer to sketch No. 3, of which I think a substantial part is reproduced in the brooches. The question of colour is immaterial, but I find reproduced in the figure of which the brooches consist the following salient features of Popeye in sketch No. 3, namely, the sailor's cap, the nose, the chin, the mouth, the swollen forearms, the baggy trousers, and the enlarged feet. This, I consider, constitutes a reproduction of a substantial part of sketch No. 3. Further, I am of opinion that a comparison of the brooch with the sketch in question raises a strong presumption (not displaced by any evidence) that the figure of the brooch was copied directly or indirectly from that sketch. In those circumstances the contention of Mr. Shelley, which was described by the trial judge as a "somewhat "unattractive argument," does not arise and need not be considered.

There remains the question of s. 22, as to the effect of which a difference of judicial opinion has arisen. The plea of s. 22, as relied on before Simonds J., seems to have assumed the following form, namely, a contention that the sketches of Popeye were designs which were capable of being registered under the Patents and Designs Act, 1907, and were not within the exception contained in s. 22, with the result that the

H. L. (E.)

1941

KING FEATURES SYNDICATE, INC. v. O. & M. KLEEMAN, LD.

Lord Russell of Killowen.

appellants never had any copyright therein. In other words, that s. 22 afforded a defence, because it established absence of copyright in the appellants. Simonds J. rejected this contention. In the Court of Appeal, and in your Lordships' house, s. 22 was relied on as affording a defence, not because it established absence of copyright in the appellants, but because it exonerated the respondents from any liability for acts which (but for the section) would have been infringements of the copyright conferred on the appellants by s. 1 of the Act. The foundation of this contention was the licence granted for a limited period, and on specific terms, to certain persons (not the respondents) to make dolls and brooches copies from the sketches of Popeye, identical with those which the respondents subsequently produced but without the appellants' permission. The argument then proceeds that the dolls and brooches produced by the appellants' licensees were designs which were capable of being registered under the Patents and Designs Act, 1907, and were not within the before-mentioned exception, and so, too, were the dolls and brooches copied from them by the defendants. Therefore (and this is the climax), as a result of s. 22 of the Copyright Act, 1911, s. 2 (which defines infringement) and s. 6 (which gives remedies for infringement) do not apply to the articles which the defendants have manufactured and sold.

My Lords, the licensees are, of course, protected from the charge of infringement by their licence, but that the effect of the grant by the owner of the copyright in a sketch of a figure to A of a limited licence to reproduce for sale the figure in three dimensions is that B is (by virtue of s. 22) franked for ever in a career of piracy, is a result so startling as to require the clearest words of enactment to justify it.

Clauson L.J., in an elaborate judgment, has come to the conclusion that the respondents' contention is right, and Scott L.J. agreed with his conclusion. On the other hand, Luxmoore L.J. assigns a more limited operation to s. 22, namely, that it operates to prevent the acquisition of copyrights in the defined cases, but does not operate to take away or impair a copyright already bestowed. The judgment of

H. L. (E.)
1941
King Features Syndicate, Inc. v. O. & M. Kleeman, Ld.
Lord Russell of Killowen.

Clauson L.J. adopts the reasoning of the respondents which I have already indicated, but I fail to appreciate the necessity of introducing any reference to the licence or the licensees. If the argument is sound, as stated, I do not see why it is not equally sound simply to say that a reproduction by anyone of the sketch-figure in three dimensions, intended to be used as a model to be multiplied by an industrial process, is a design to which the Copyright Act does not apply, and, therefore, is an article to the production and sale of which the owner of the copyright in the sketch can raise no objection. In my opinion, this view of the operation and effect of s. 22 is wrong. There is no previous authority to justify or support it, nor is there anything in the wording of the section to suggest that the Act, having operated to confer copyright on an individual with remedies for its protection, is to cease or suspend its operation for any reason. The words "shall not "apply" point to the section being concerned only with circumstances in which the Act shall never come into operation at all. In other words, the section (as pointed out in Copinger on Copyright, 7th ed., at p. 66) is providing for exclusion from protection under the Act of the designs therein described. It does not operate to bring an existing artistic copyright to an end, or to absolve pirates from the offence of piracy.

I agree with the view of Luxmoore L.J. as to the effect and operation of the section and I would allow the appeal. The order of the Court of Appeal should be discharged, and an order should be made in accordance with the submission contained in para. 14 of the case for the appellants. The respondents should pay the appellants' costs of the trial, of the appeals to the Court of Appeal and to this House.

Lord Wright. My Lords, of the various general questions which were agitated and decided in the courts below one alone has been raised before your Lordships. It is a question of some importance because it involves determining what is the construction of s. 22 of the Copyright Act, 1911, so far as it is relevant to the facts of the case.

I must, however, before discussing that question of principle,

H. L. (E.)
1941
KING FEATURES SYNDICATE, INC.
v.
O. & M. KLEEMAN, LD.
Lord Wright.

state my conclusion on a limited issue of fact on which the respondents succeeded in the Court of Appeal but failed before Simonds J. Three classes of the respondents' productions were said to infringe the appellants' copyright in the sketches of "Popeye, the Sailor." These were the brooches, the dolls, the mechanical toys. The two latter classes were held by the unanimous decision of the Court of Appeal to be actionable infringements apart from the defence based on s. 22. The first class, the brooches, were held by the Court of Appeal not to be copied from the appellants' sketches, directly or indirectly. It was rightly not questioned in this House that under s. 1 of the Copyright Act, 1911, the sole right to produce or reproduce the sketches or any substantial part thereof in any material form whatsoever would cover a reproduction of a substantial part of the sketches or any of them in three-dimensional form, as by the dolls or the mechanical toys. In the case of these it was not contested before this House that the dolls or the toys were reproductions of a substantial part of the sample sketch selected, though in a different medium, namely plaster, and in coloured three-dimensional figures as contrasted with the flat published sketch in plain black and white. But the respondents supported the view of the Court of Appeal that with regard to the brooches no copying, whether direct or indirect, was made out. This is a question of fact. No evidence of the actual operation of copying or of its absence has been given. The respondents called no evidence. The issue must thus be determined simply on the basis of a comparison between the brooches (which may be treated as all of the same design notwithstanding some minor variations in the actual examples) and the selected sketch, which was No. 3 of the sketches published by the New York Evening Journal on January 17, 1929. The test to be applied is purely visual, the sketch and the brooch being compared oculis subjecta fidelibus. It is not material that the respondents were stealing the idea of "Popeye, the Sailor," or availing themselves for commercial profit of the popularity acquired by that figure. The appellants' copyright is in the actual sketch, not in the idea. There would be no infringement if the respondents had independently produced a similar figure without copying the sketch directly or indirectly. The question is whether there was copying of the actual sketch. Here the only evidence of actual copying, direct or indirect, is similarity with regard to the figure, which is a substantial part of the sketch, between the copyright work and the alleged infringement. I think, however, that, where there is substantial similarity, that similarity is prima facie evidence of copying which the party charged may refute by evidence that, notwithstanding the similarity, there was no copying but independent creation. In the present case, on a careful comparison of the brooches and the sketch, I find substantial similarity between the different editions of the brooch and sketch No. 3, sufficient to raise a prima facie case of actual copying. The respondents have called no evidence to rebut that prima facie case. I agree, accordingly, with Simonds J. in finding that copying is proved in respect of the brooches, equally with the dolls and toys.

On that footing, as regards all three classes the only defence now set up by the respondents is based on s. 22 of the Copyright Act, 1911. On this defence Simonds J. decided in favour of the appellants, but the majority of the Court of Appeal, Luxmoore L. J., with whose judgment I agree, dissenting, reversed that decision. That section is in the following terms: "(1.) This Act shall not apply to designs capable of being "registered under the Patents and Designs Act, 1907, except "designs which though capable of being so registered, are not "used or intended to be used as models or patterns to be "multiplied by any industrial process. (2.) General rules "under s. 86 of the Patents and Designs Act, 1907, may be "made for determining the conditions under which a design "shall be deemed to be used for such purposes as aforesaid." By the Designs Rules, 1920 (St. R. & O. 1920, No. 337), it is provided (inter alia) that a design (other than textile designs which are differently dealt with) is to be deemed to come within s. 22, if reproduced or intended to be reproduced in more than fifty articles not together constituting a set. The designs of the dolls, toys and brooches were admittedly used and intended to be used in more than fifty articles which were to be made in or imported into the United Kingdom by the respondents.

The respondents' contentions may be stated very broadly, but not, I think, unfairly, to be that the dolls, toys and brooches were designs within s. 22 and as such had a character separate from the sketch which they substantially reproduced, and that, though, apart from s. 22, they would have been infringements of the appellants' copyright in the sketch for which the remedies under the Copyright Act could have been enforced, s. 22 gave a complete immunity in respect of the infringements, by reason that, under the provisions of the section, the Act was not to apply to them at all because they were designs to which the section applied and thus no proceedings for the infringements were competent. It was not contended that the appellants had lost their entire copyright in the sketch, but it was said that a portion was carved out of the full copyright which thus became reduced or truncated to the extent that the appellants had lost the right to the protection of the Act against the particular infringements involved in the respondents multiplying the dolls, toys and brooches. It was conceded that, if the appellants had not granted, as they did, licences to certain licensees for a period of one or two years to copy the sketch in the form of the dolls, toys and brooches, the appellants would not have lost the right to take action against the respondents for infringement of their artistic copyright, but it was said that the appellants lost their full copyright by licensing the creation of the designs and had lost it for the full period of the artistic copyright even though the licence was limited to one or two years and was limited to the particular kinds of articles. I find this argument very difficult to understand. I cannot see how the position of the unlicensed copyist in face of the copyright owner can depend on the circumstance that the latter has granted a licence to a third party by way of whose productions the copyist has copied the owner's work. But I need not pursue that difficulty because I cannot extract from the words of s. 22 the principle that an unlicensed copier is immune from proceedings for infringement at the suit of the copyright owner simply because the form in which he has copied is the production of material articles which satisfy the statutory definition of designs, and, subject to the conditions postulated in the Trade Marks and Designs Acts, may be entitled to protection as designs. There is nothing in s. 22 of the Copyright Act which can be construed as cutting down or destroying the full scope of the artistic copyright when once it has attached under the Act, or giving a licence to an infringer to pirate the copyright work so long as the piracy takes the form of the production of designs within the statutory meaning of that word. In my opinion, clear words would be required to deprive a person, in whole or in part, of his full copyright without his consent, when once that copyright has accrued to him, or to grant a charter to a stranger to steal the property of the copyright owner.

Sect. 22 appears to me to admit of a simpler and more reasonable interpretation. By its express terms the Act is not to apply to such designs as fall within the specified limitations. In my opinion, the legislature is there drawing a distinction between copyright under the Act of 1911 and what has been called design copyright or copyright in designs under the Patents and Designs Acts. The latter is a right distinct from the former. The statutory definition of design now in force is found in s. 19 of the Patents and Designs Act, 1919, which replaces that given in s. 93 of the Patents and Designs Act, 1907. The operative definition so far as here material is : "'Design' means only the features of shape, configuration, "pattern or ornament applied to any article by any industrial "process or means whether manual, mechanical or chemical, "separate or combined, which in the finished article appeal "to and are judged solely by the eye." Thus, design involves certain elements. There must be features of shape, configuration, pattern, or ornament, and these must be applied (or intended to be applied in the words of s. 22 of the Copyright Act) to any article by way of industrial means or process. Sect. 22 emphasizes the same aspects. Designs to which the section is to apply are those used or intended to be used as models or patterns to be multiplied by any industrial process.

Thus, a design may be the shape of a coal scuttle, a basin, a motor car, a locomotive engine or any material object. It may be the shape embodied in a sculptured or plastic figure, which is to serve as a model for commercial production, or it may be a drawing in the flat of a complex pattern intended to be used for the manufacture of linoleum or wall paper. Design copyright is thus to be distinguished from artistic copyright. Indeed, though the design itself cannot acquire artistic copyright, a photograph or drawing of it may. I think it is clear from these definitions that s. 22 cannot apply to the appellants' sketch. It was made as an illustration in a newspaper and for no other purpose. So far as appears or can be inferred, there was no intention to use it as a model or pattern to be multiplied by any industrial process. It was not, it is true, a work of any high artistic merit, but it was clearly entitled to the protection which the Act of 1911 gives to artistic copyright. It was not until about eight years after its publication in the newspaper that the appellants granted a licence for the making of the dolls, toys and brooches. When that licence was acted on, for the first time there came into existence designs because there came into existence models or patterns intended to be applied to the particular articles licensed and intended to be multiplied by industrial processes. These designs were potentially the subject of the rights given by the Patents and Designs Acts, but they did not in fact acquire these rights because, though capable of being registered under the Acts by the licensees, they were not actually registered. If they had been registered and if the Acts had been otherwise complied with, they would have acquired the rights under the Patents and Designs Acts, which are much narrower than those given by the Copyright Act—for instance those rights would have been for a limited period of five, ten or fifteen years, and in respect only of the articles for which registration was granted. Having these rights as designs, they were not to have any further or other rights under the Copyright Act. It was not intended that they should have a cumulative protection both under the Copyright Act and under the Patents and Designs Act.

But I have been unable to appreciate how all this can affect the artistic copyright for this country which is vested in the appellants with regard to the sketch. That copyright was acquired when the sketch was published in Canada, simultaneously with its publication in the United States where it was made. There was then no idea of using it for a design or model or pattern for industrial purposes. The multiplication of copies of the sketch by the ordinary processes of printing did not in my opinion make it a design within the Patents and Designs Acts or within s. 22 of the Copyright Act. It was never until some years after the sketch acquired its artistic copyright used or intended to be used as a model or pattern. The difficulties which in some other cases may exist in applying the statutory definitions or descriptions of designs to artistic works, such as pictures, drawings, sketches, sculptures, do not I think arise in this case. There is no reason why the sketch should be considered at its inception as a design within the meaning of the Patents and Designs Acts and I see no reason to hold that it ever changed its character as an artistic production entitled to protection under the Act of 1911.

In a case like this the use or intention to use which s. 22 postulates must exist at the date when the sketch was made. That is the natural time. At that time the copyright under the Act of 1911 either vests or is excluded under s. 22. In the facts of this case the sketch was never a design to which s. 22 had any application. The dolls, toys and brooches could acquire no rights save under the Patents and Designs Acts in their character of designs.

Sect. 22 is not a very perfect example of drafting. I think the governing element in the definition is the use or intention to use the design as a model or pattern for industrial multiplication. There may be artistic works which ab initio fall within the category of designs, as my noble and learned friend, Lord Russell, held in *Ware* v. *Anglo-Italian Commercial Agency, Ld.*, No. 1 (1). The design there was a drawing for a motor car body. The drawing was made for the specific purpose of applying the features of shape and configuration found in the drawing to a number of such bodies exceeding

(1) (1922) Macg. Cop. Cas. (1917 to 1923) 346.

H. L. (E.)
1941
KING FEATURES SYNDICATE, INC.
v.
O. & M. KLEEMAN, LD.
Lord Wright.

fifty by means of industrial processes. In these circumstances the effect of s. 22 was held to be to exclude the drawing from protection under the Copyright Act which on the facts never applied to the drawing. In *Con Planck, Ld.* v. *Kolynos Incorporated* (1), my noble and learned friend, Lord Sankey, then Sankey J., seems to have been prepared to adopt a similar test. He was disposed to think that: "a design is "something produced as a pattern to assist one in making "some other article which shall appeal to the eye, a thing "which has no market in itself but is meant to be applied to "some other article." In cases of that nature, what might in other circumstances have been regarded as entitled to artistic copyright may be held to be a design entitled, if other conditions are fulfilled, to protection under the Patents and Designs Acts, but excluded from the protection under the Copyright Act by s. 22. Such a case is illustrated in *Pytram* v. *Models* (*Leicester*), *Ld.* (2), where Clauson J. (as he then was) held that a wolf cub's head, produced as a model for multiplication by industrial processes, was not entitled to copyright under the Act of 1911, because of s. 22. Nor had it any protection as a design because it had not been registered. On the other hand, a picture produced by an artist or a piece of statuary produced by a sculptor does not lose its copyright under the Act of 1911 merely because at some later date it or some portion of it is used as a model or pattern for the multiplication by industrial methods of objects of commerce, for instance, for wall papers or figures in relief or three-dimensional figures. I can conceive some difficult problems arising in cases of this nature, but they do not arise in the present case, in which s. 22, in my opinion, has no application to the sketch. I agree that the appeal should be allowed.

LORD ROMER (read by LORD PORTER). My Lords, of the two questions which alone have to be decided on this appeal, one is of considerable general importance. It is the question whether, in view of s. 22 of the Copyright Act, 1911, the present

(1) [1925] 2 K. B. 354.
(2) [1930] 1 Ch. 639.

H. L. (E.)
1941
KING FEATURES SYNDICATE, INC.
v.
O. & M. KLEEMAN, LD.
Lord Romer.

action is maintainable at all. The other is relatively of little importance, except to the parties to the present litigation. It is the question whether, assuming the first question to be answered in the affirmative, the "Popeye" brooches being sold in this country by the respondents constitute an infringement of the appellants' copyright.

The facts material to a decision of the two questions have been fully stated in the opinion of my noble and learned friend on the Woolsack. I need not repeat them, and can turn at once to a consideration of s. 22 of the Copyright Act, 1911. It is a curiously ill-drafted section, and it is by no means easy to make it fit in with the definition of the word "design" for the purposes of the Patents and Designs Act, 1907, which is now contained in s. 19 of the Patents and Designs Act, 1919. That definition is in these terms: "Design means only the "features of shape, configuration, pattern or ornament applied "to any article by any industrial process or means whether "manual, mechanical or chemical, separate or combined, which "in the finished article appeal to and are judged solely by "the eye, but does not include any mode or principle of "construction." A design capable of registration under the Patents and Designs Act, 1907, cannot, therefore, consist of a mere conception of the features mentioned in the section, or, in the case of an article in three dimensions, of a representation of such features in two dimensions. It must, in such a case, to comply with this definition, consist of the features as they appear in the article to which they have been applied by some industrial process or means. I do not doubt that, for purposes of convenience in keeping the register, the thing actually registered will often be a representation in two dimensions of the thing that is used or intended to be used as a model or pattern. But this fact cannot, in view of the definition, make such a representation a design capable of being registered under the Patents and Designs Act, 1907, within the meaning of s. 22 of the Copyright Act, 1911. It may at first sight appear that, in view of this definition of the word "design," the exception contained in sub-s. 1 of s. 22 is to some extent unnecessary and superfluous. But this is not so. The important word in this exception is "multiplied." Although, therefore, a design must consist of features already applied to some article by some process or means of an industrial nature, it is not affected by sub-s. 1 of s. 22 unless it has been or is intended to be multiplied by such a process to the extent prescribed by general rules made in pursuance of the provision contained in sub-s. 2 of the section.

My Lords, I have ventured to make these observations because before Simonds J. it was contended by the respondents that the drawings of "Popeye, the Sailor" published in and subsequent to the year 1929 in the United States and Canada were themselves designs capable of being registered under the Patents and Designs Act, 1907. If this contention could be maintained, it would follow that the appellants have no copyright in the drawings at all unless they fall within the exception contained in s. 22. The question would then arise whether the use of the drawings which was made by the appellants' licensees as patterns for the multiplication of their dolls and brooches by an industrial process deprived the appellants of the benefit of the exception. But the contention of the respondents to which I have referred was rejected, and, in my opinion, rightly rejected, by Simonds J. It is quite plain that the drawings are not themselves designs capable of registration under the Patents and Designs Act. No one could rightly say that by these drawings the author had applied features of shape or configuration to any articles by some industrial process or means. Nor did the respondents in their arguments before your Lordships rely on any such contention. Indeed, in para. 14 of their printed case they state in terms that they do not contend that the sketches are registrable as designs or that they are deprived of artistic copyright so as to prevent the appellants from restraining, for example, their republication in a rival newspaper. What they do contend is that, when the licensees of the appellants applied by industrial process the features of shape and configuration depicted in the drawings to their dolls and brooches, there came into existence a registrable design which was used or intended to be used as a model or pattern to be multiplied by an industrial process within the meaning of r. 89 made pursuant to s. 22, sub-s. 2. Their contention, so far, is unquestionably sound, but their next contention is that, thereupon, the appellants ceased to be able to prevent the respondents from reproducing the drawings in the form of the dolls or brooches, even assuming that the brooches would otherwise have infringed the appellants' copyright. This, they say, is the effect of s. 22. Their argument is, as I understand it, as follows: " It is in effect provided by s. 22, sub-s. 1, that "the Act shall not apply to a design capable of being registered "which is lawfully used or intended to be used as a model or "pattern to be multiplied by any industrial process. It, "therefore, follows that s. 1, sub-s. 2, of the Act must be read "as though after the words ' in any material form whatsoever ' "there were inserted words excepting such a design as above "mentioned. The respondents have not, therefore, done "anything the sole right to do which is by the Act conferred "on the appellants, and, accordingly, have not infringed the "appellants' copyright within the meaning of s. 2, sub-s. 1." It will be observed that in this argument the respondents have introduced into s. 22, sub-s. 1, the word " lawfully." This they felt constrained to do, because otherwise the section, on their construction of it, would have had a perfectly ridiculous result. No owner of the copyright in an artistic work could ever have restrained the use of it as a design. The introduction of the word " lawfully," moreover, does not, according to the respondents' contention, put them out of court. The appellants' licensees were obviously using the design lawfully, and, as they did not register it under the Patents and Designs Act, the respondents, so they argue, could lawfully copy it. But if the word " lawfully " be introduced into s. 22, sub-s. 1, it must surely mean lawfully as between the owner of the copyright in the artistic work and the person who makes the design, and to say that the respondents lawfully copied the design begs the question that has to be decided.

But, my Lords, even if the last mentioned argument be conceded to the respondents, I cannot bring myself to think that this contention of the respondents as to the effect of

H. L. (E.)
1941
King Features Syndicate, Inc.
v.
O. & M. Kleeman, Ld.
Lord Romer.

s. 22, sub-s. 1, is a sound one. I can find no justification in that section for introducing into s. 1, sub-s. 2, of the Act an exception which is not there, and all the more so because, unless the exception is to render s. 22, sub-s. 1, ridiculous in its relation to artistic works, there has also to be introduced into the last mentioned sub-section a word that likewise is not there. In my opinion, the only object and the only effect of s. 22, sub-s. 1, is to ensure that the Act shall not confer on a work which is a design within the meaning of s. 19 of the Patents and Designs Act, 1919, artistic copyright under the Copyright Act, 1911. Such a construction of the section seems to me to give full effect to every word of it and to produce a sensible result. It is the construction that was put on the section by Luxmoore L.J., who, in my opinion, arrived at a right conclusion upon the matter.

As regards the question whether the brooches being imported and sold by the respondents are a reproduction in a material form of a substantial part of the drawing No. 3 in the strip appearing in the New York Evening Journal of January 17, 1929, I respectfully differ from the decision of the Court of Appeal and agree with that of Simonds J. In my opinion, the proper inference to be drawn from a comparison of the drawing and the brooches made by the appellants' licensees (of which the respondents brooches are an exact copy) is that, in designing the brooches, the licensees copied the principal features of the drawing. It is, no doubt, quite possible that the licensees copied one of the drawings subsequently published in which the author himself repeated those features. It is also possible that no copying of any of the drawings took place in fact. In other words, the inference which I have drawn might have been displaced by oral evidence, but it was not, and the inference remains. For these reasons, I am of opinion that the appeal should be allowed.

Lord Porter. My Lords, this case raises a difficult question as to the true construction and effect of s. 22 of the Copyright Act, 1911. Save for a subsidiary point which is substantially a point of fact, Simonds J. took one view, whereas the Court of Appeal, by a majority, reversed his finding. On the subsidiary point, all the members of the Court of Appeal differed from the view of the learned judge of first instance.

Admittedly, the appellants are, or one of them is, the owners or owner of the copyright in a fictitious character, "Popeye, "the Sailor," who was originally depicted in a series of drawings in strips. The appellants were minded to exploit the popularity of this figure, and they, accordingly, granted a licence to certain licensees to manufacture and sell brooches and mechanical dolls of certain types simulating it. These brooches and dolls were produced and sold by the licensees in number far exceeding fifty, but neither brooch nor doll was registered by the appellants or by the licensees in any class under the Patents and Designs Act, 1907. The respondents, having observed the success of the licensed productions, were anxious to share in the profit so gained, and with a view to obtaining a licence for themselves approached the appellants to ascertain what remuneration would be required. Being unable, however, to obtain terms sufficiently attractive, they proceeded to have the licensed brooches and dolls exactly copied in Japan and imported and sold them in this country, The appellants, thereupon, sued the respondents for infringement of copyright, claiming certain declarations, an injunction, various accounts, and delivery up of infringing copies and plates for destruction. The respondents defended their action on a number of grounds not now relied on and by two arguments on which your Lordships have to pronounce: (1.) they said it had not been proved that the brooches were a reproduction in a material form of any of the appellants' sketches which were relied on; and (2.) that in any case s. 22 of the Copyright Act of 1911 was a defence to the action.

The first point requires a little more amplification of fact. The strips representing "Popeye, the Sailor" are admittedly very numerous. In order not to over-burden the case the appellants chose fifty-five strips only on which they relied for proof of their case. No evidence was called, but the appellants put in the fifty-five strips and a number of examples of the dolls and brooches. No question arises as to the dolls. It is admitted that they were a reproduction in a material form of the appellants' sketches, but the brooches, it was said, exhibited no sufficient likeness to the strips to show that they were copies of the principal figure in any of the strips relied upon. They might well be, and were more likely to be, copies from other strips. Indeed, it was said that the respondents did not know from what the brooches had been copied since they had imitated not the sketches themselves but the licensees' productions and could not tell which of the many figures had been used as a model. No evidence, however, to this effect was given and it was admitted that this argument could not succeed if the representation on the brooch bore a likeness to the figure of "Popeye" on any one of the fifty-five strips sufficient to afford prima facie proof that any one of those figures had been the original from which the brooch was derived.

Your Lordships have, therefore, to determine whether the brooch sufficiently resembles any of the fifty-five sketches so as to afford prima facie evidence that it is a reproduction in a material form of one of them. Counsel for the appellants stated that he was content to rely on the resemblance to figure 3 in strip 1 of those put in. For myself, I think the resemblance is sufficient. It repeats the salient features. The cap, face, nose, chin, mouth and pipe, swollen forearms, baggy trousers and feet are all there. This is the subsidiary point on which all the members of the Court of Appeal differed from the learned judge and held that the brooches were not a reproduction of sketch 3, or, indeed, of the figure in any of the fifty-five strips. I prefer the view of Simonds J., and, in coming to that conclusion, I have not forgotten two arguments of the respondents' counsel.

In the present case he contended that the brooch had not been proved to have been copied from any one of the fifty-five strips, and that there were a very large number of other strips not proved to be the subject of copyright from which it might have been copied. Obviously if the brooch were a reproduction of something not in itself the subject of copyright it could not be an infringement. But if the respondents desire to rely on this argument they must prove it. None of the other strips was produced and there was no evidence that the brooch resembled any one of them whereas there is a marked resemblance to those produced. Secondly, it is argued that Simonds J. applied the wrong test. He asks, it is said: Could this be recognized as a new material form of the essential "Popeye"? instead of asking: Is this a copy of a material sketch? Bayley J. in *West* v. *Francis* (1) defined a copy as "that "which comes so near to the original as to give to every person "seeing it the idea created by the original." This definition was criticized by Lord Watson in *Hanfstaengl* v. *Baines* (2), where he pointed out that the idea created by a picture or drawing does not necessarily form an element in the original work or its design which is protected by copyright. The same idea which is suggested by the copyright work may be expressed by another painting or drawing which is in no sense a copy and does not borrow its design. No doubt, if the learned judge had asked himself whether the essential idea of "Popeye" had been utilized in the dolls and brooches, instead of asking whether one or more of the material sketches had been copied, he would have applied the wrong test. But I do not understand him to have come to his conclusion because he thought that the idea of "Popeye" had been copied. He meant, I think, only that the brooch sufficiently resembled the figure as drawn in any one of the strips relied on, the salient features being practically identical in each.

In my view, therefore, all the suggested infringements are in the same category. All are copied from some of the sketches and in relation to each the question must be determined: Is the reproduction protected by s. 22, sub-s. 1, of the Copyright Act, 1911? It was not disputed that the dolls and the brooches were designs capable of being registered under the Patents and Designs Act and it was admitted that they or their prototypes were used and intended to be used as models or patterns to be multiplied by an industrial process within the provisions of the Act and of r. 92 of the Designs Rules, 1932. The exception, therefore, does not apply, and the contest between the parties turns on the true construction of the first two lines of the sub-section.

---

(1) 5 B. & Ald. 737, 743. (2) [1895] A. C. 20, 27.

The appellants said that they mean that the copyright conferred under the Copyright Act, 1911, shall not extend to designs capable of being registered under the Act of 1907. In their contention the section prevents such designs from acquiring copyright under s. 1 of the Act of 1911, but in no way interferes with any other copyright which would be infringed by their production in material form. If, as in this case, copyright has been acquired in a sketch, and either the owner of the copyright himself or his licensee produces a registrable design from it, the design, unless registered, is not the subject of any copyright, but the original sketch retains its copyright, and, if an unlicensed person copies the design and that design would, if produced without the consent of the owner, be an infringement of copyright in the sketch, then the unlicensed person is an infringer none the less that he copied the design and not the sketch. In their submission s. 22 does not deprive an owner of copyright already acquired under the provisions of s. 1 of the Copyright Act, 1911, or prevent him from suing for its infringement under s. 2. It merely prevents a fresh copyright from coming into existence. The copyright in the sketch remains, but without registration no design copyright is obtained in the brooches or dolls.

The respondents, on their part, admitted that copyright had originally been acquired in the sketches, but said that s. 22 took away that copyright so far as the brooches and dolls were concerned because they were registrable designs which had not been registered. In these circumstances the respondents maintained that the appellants had not only failed to acquire any copyright in the brooches and dolls but had also lost certain rights in the original sketches which they would otherwise have retained. They had, it was said, lost the right to complain of a reproduction of the licensed brooch or doll though they could prevent any other infringement of their copyright in the sketches. The argument, as I understand it, was as follows: The words used in s. 22 are "This Act shall "not apply to designs," etc. The Act, therefore, does not apply for any purpose. On the one hand, it does not confer copyright under s. 1 of the Act in respect of designs capable of being registered; on the other hand, those designs are not to be deemed to be infringing copies of any other copyright work under s. 2. They are taken out of the Act altogether—they neither acquire copyright nor infringe copyright. They might be protected by registration under the Patents and Designs Act, 1907, and so themselves acquire copyright, but, if capable of registration, they acquire, as it were, an existence independent of the original sketch if that sketch is not itself a design capable of being registered, and, apart from registration, no one can be restrained from copying them. The respondents acknowledged that the result of such an interpretation of the section would be that, if a pirated copy of a copyright work were used as a registrable design, it would not constitute an infringement of the sketch from which it was derived, and that, consequently, the pirate who made but did not register it could use it without penalty. This somewhat peculiar result might, as the respondents admitted, be the logical consequence of their argument, but, they said, this difficulty would be overcome if the words of the exception were read as meaning "except designs which though capable of being registered are "not *lawfully* used or intended to be used as models," etc. "Lawfully" as the respondents urged should be read into the section by necessary implication. If, therefore, the sketches were used by a pirate as a model for a registrable design he would infringe the copyright in them, but if they were so used either by the owner of the copyright in the sketches or by a licensee the designs would be lawfully used and if not registered anyone was free to copy them.

It was further contended that a construction which left a double copyright, first, in the sketches, and, secondly, in the design, would defeat the object of the Designs Act since that Act confined the period of copyright to ten or at most fifteen years, whereas the Act of 1911 gave not less than fifty years. Anyone, therefore, who first published the work for which he wished to acquire copyright in a form which could not be registered would acquire pictorial copyright, and if, at a later stage, he decided to use it as a design, his pictorial copyright would protect him for the longer period even though he failed to register the design. Arguments ab inconvenienti are not in themselves very conclusive as to the meaning of an Act of Parliament, and in the present case this last contention depends on an event not very likely to occur in practice. In most cases the subject of copyright will at its inception either be intended to be used as a design for multiplication or composed for its own sake. It may be that in the latter event in some exceptional cases the subject-matter will afterwards form the basis of a design and so acquire the potentiality of protection under the Designs Act in addition to the fine art copyright which it has already obtained, but even if this be so, the true construction of the section depends on its wording rather than upon a possibly unexpected result.

One is thrown back, therefore, on the words themselves. It is plain that the respondents can only succeed if the word "apply" bears the construction which they seek to put upon it. In support of their contention they called attention to the contrast in language between s. 22 and ss. 23 and 35, sub-s. 2. In the first, in their submission, the wording is appropriate to prevent the Act applying for any purpose whether to protect a work or to restrain an infringement. In the second, it is appropriate to confer copyright, and, in the third, to prevent infringement. Undoubtedly, the language varies, but the deduction sought to be drawn is not, I think, warranted. A mere contrast in language between section and section, may be, and I think here is to be, explained by reference to the difference in subject-matter rather than by an intention to produce a different result.

For its true construction, therefore, the exact wording of s. 22 must be considered, and that wording is to my mind far too indefinite to take away copyright already acquired. It is more readily explicable as intended to prevent the acquisition of a fresh copyright. The Act is not to apply to, that is, is not to confer copyright on, registrable designs. It would be to make an unjustifiable addition to the natural meaning of the words to read them as enacting that registrable designs shall not constitute an infringement of copyright already acquired in drawings from which they are derived. Had it been intended to produce this result it would have been easy to make the intention clear.

It has been recognized that in construing s. 22, sub-s. 1, it is convenient to disregard the double negative and treat the section as though it read: "The Copyright Act shall not "apply to the designs of works used or intended to be used as "models or patterns to be multiplied by any industrial process "where the designs of such works are capable of being registered "under the Designs Act," and "design" is now defined by s. 19 of the Act of 1919 in the following words: "'Design' "means only the features of shape, configuration, pattern or "ornament applied to any article by any industrial process or "means, whether manual, mechanical, or chemical, separate or "combined which in the finished article appeal to and are "judged solely by the eye, but does not include anything "which is in substance a mere mechanical device." Design, therefore, may be embodied in a sketch illustrative of the model which is to be multiplied or in the model itself, e.g., in a sketch of a brooch or doll or in a brooch or doll itself.

In the present case the designs were presumably either a sketch prepared by or on behalf of the licensees or a completed brooch and doll. Whichever they were, being unregistered, they were not the subject of design copyright under the Act of 1907, but the original sketches, which were not used or intended to be used as models or patterns to be multiplied by any industrial process, retain their copyright and their owner can prevent any infringement of that copyright, though the licensees could make no complaint of the reproduction of their designs which were both intended to be and were so used.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Shaen, Roscoe & Co.*
Solicitors for respondents: *Derick R. Martin & Co.*

[PRIVY COUNCIL.]

WINDSOR EDUCATION BOARD . . APPELLANT;

AND

FORD MOTOR COMPANY OF CANADA, LIMITED, AND OTHERS . . . . RESPONDENTS.

J. C.*
1941
July 30.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Ontario) — Rating — Education — Assessment for separate schools purposes—Compliance with statutory requirements—Onus of proof—Separate Schools Act, R. S. O., 1937, c. 362, s. 66—Construction.

The onus of proving that the part of an assessment of a corporation for rating for educational purposes which is allocated by the corporation by notice on Form B under s. 66, sub-s. 1, of the Separate Schools Act, R. S. O., 1937, c. 362, to separate schools does not, as required by sub-s. 3 of s. 66 of the Act, bear a greater proportion to the whole of the assessment of the corporation than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares rests on the corporation. Where, therefore, it was established that the proportion of the assessment of the respondent company which the company required, by their statutory notice, to be entered for separate school purposes, was not based on actual knowledge of the percentage of Roman Catholic shareholders in the company, but only on a guess or an estimate, the respondent company, although they had acted in good faith, had not discharged the onus which rested on them, so that the notice was null and void and the whole of the assessment of the company in the municipality in question must be rated for public school purposes.

The statute does not require the precise shareholding of Roman Catholics to be ascertained. All that is required is that the company should prove at least a minimum figure of Roman Catholic holdings and that the ratio required by the notice does not exceed the proportion of holdings measured by that figure.

The appeal tribunals have no power to amend an assessment by reference to the true ratio when ascertained. It is then for the corporation to make such fresh apportionment as they may decide and to give a fresh notice.

Judgment of the Supreme Court of Canada [1939] S. C. R. (Can.) 412, reversed.

APPEAL (No. 28 of 1940) by special leave from a judgment of the Supreme Court of Canada (October 30, 1939) affirming by a majority a unanimous decision of the Court of Appeal for

---

* *Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ROMER.

J. C.
1941
Windsor Education Board v. Ford Motor Co. of Canada, Ld.

Ontario (May 12, 1938) which had reversed a judgment of the judge of the county court of Essex, Ontario (March 19, 1938), dismissing an appeal by the respondents, the Ford Motor Company of Canada, Ld., from the decision of the court of revision of the city of Windsor on a complaint by the appellants, the Board of Education for the City of Windsor, against an assessment of the respondent company for rating for educational purposes.

The following statement of the facts is taken from the judgment of the Judicial Committee: The proceedings before the Court of Appeal for Ontario arose on a case stated by the county court judge which raised specific questions of law, the judge's findings of fact being final. The dispute between the parties arose on the statutory provisions made in Ontario for the raising of revenue for the purposes of education, under which provisions individuals and corporations alike were liable to be assessed and rated on their property in a municipality for educational purposes. In the absence of some action taken by the persons so assessed they would be rated for public school purposes, but any individual liable to be assessed might claim to be assessed as a supporter of separate schools, which, for the present purpose, may be taken to mean Roman Catholic schools, in which case his property would be entered in a separate assessment roll and he would then be rated by a board of trustees for such separate schools in accordance with the requirements of such board. The statutory provision relating to that separation of assessments in the case of corporations who might include among their shareholders members who were Roman Catholics was s. 66 of the Separate Schools Act, R. S. O., 1937, c. 362 (1). In the present case, as found

---

(1) "(1.) A corporation by notice "(form B) to the clerk of any "municipality wherein a separate "school exists may require the "whole or any part of the land of "which such corporation is either "the owner and occupant, or not "being the owner is the tenant, "occupant or actual possessor, "and the whole or any proportion "of the business assessment or "other assessments of such "corporation made under the "Assessment Act, to be entered, "rated and assessed for the purposes of such separate school.

"(2.) The assessor shall thereupon enter the corporation as a "separate school supporter in the "assessment roll in respect of the in the case stated, the respondent company on July 27, 1937, passed a resolution to give the statutory notice requiring that eighteen per cent. of their assessment in the city of Windsor be entered, rated and assessed for separate school purposes. The assessor acted on the notice, and the company were accordingly assessed in the roll of separate school supporters for eighteen per cent. of their total assessment, namely, $1,075,200 out of a total of $5,933,360. On September 30, 1937, the appellant board appealed to the court of revision for the city against the assessments for separate school purposes of twenty-three companies of whom the respondent company were one. The court of revision, by a majority, allowed the appeal, holding that not only was no effort made by the respondent company to ascertain the number of shares held by Roman Catholics, but the company had no knowledge of the proportion of shares held by Roman Catholics. The company appealed to the county court judge. He heard evidence on both sides, and in particular the evidence of Mr. Greig, the secretary of the

---

" land and business or other " assessments designated in the " notice, and the proper entries " shall be made in the prescribed " column for separate school rates, " and so much of the land and " business or other assessments so " designated shall be assessed " accordingly for the purposes of " the separate school and not for " public school purposes, but all " other land and the remainder, " if any, of the business or other " assessments of the corporation " shall be separately entered and " assessed for public school pur- " poses.

" (3.) Unless all the stock or " shares are held by Roman " Catholics the share or portion of " such land and business or other " assessments to be so rated and " assessed shall not bear a greater " proportion to the whole of such " assessments than the amount of " the stock or shares so held bears " to the whole amount of the " stock or shares.

" (4.) A notice given in pur- " suance of a resolution of the " directors shall be sufficient and " shall continue in force and be " acted upon until it is withdrawn, " varied or cancelled by a notice " subsequently given pursuant to " any resolution of the corporation " or of its directors.

" (5.) Every notice so given " shall be kept by the clerk on " file in his office and shall at all " convenient hours be open to " inspection and examination by " any person entitled to examine " or inspect an assessment roll.

" (6.) The assessor shall in each " year, before the return of the " assessment roll, search for and " examine all notices which may " be so on file and shall follow and " conform thereto and to the " provisions of this Act, 1937, " c. 72, s. 57 (1.), part."

company. The judge found as a fact that the directors, in making the apportionment which they had made, acted in good faith and with every desire to be fair, but that the division they made was not based on actual knowledge, but was only a guess or an estimate. There was ample evidence to sustain that finding of fact. The substance of the judge's decision, however, was that the appeal should be dismissed on the ground that the respondent company had failed to prove before him affirmatively that the portion of the company's local assessment rated and assessed in support of separate schools pursuant to the resolution of the directors was no greater proportion of the whole of the assessment than the amount of the shares held by Roman Catholics bore to the whole amount of the shares, and that the onus of proving that affirmatively was on the company, as the party defending the assessment. In stating the special case the judge propounded the following questions for the opinion of the court : "(1.) Upon the facts above set out and upon the true construction of the statutes as applied to the facts, was I right "in holding that upon an appeal by a ratepayer affected by "the notice 'B,' given by the corporation and the assessment, "rating and enrolment made thereunder, the onus is upon the "corporation to establish the fact that the share or proportion "of its land, business or other assessments as set out in its "requisition (form B) does not bear a greater proportion to the "whole of its assessments than the amount of the stock or "shares held by Roman Catholics bears to the whole amount "of the stock or shares. (2.) Upon the facts above set out and "upon the true construction of the statutes as applied to the "facts, was I right in holding that upon an appeal by a ratepayer "affected by the notice 'B' given by the corporation and the "assessment, rating and enrolment made thereunder, the "onus is not upon the ratepayer attacking the assessment to "establish affirmatively the fact that the share or proportion "of the corporation's land, business or other assessments as "set out in its requisition (form B) bears a greater proportion "to the whole of its assessments than the amount of the stock "or shares held by Roman Catholics bears to the whole amount

J. C.
1941
WINDSOR EDUCATION BOARD
v.
FORD MOTOR CO. OF CANADA, LD.

"of the stock or shares. (3.) Upon the facts above set out and "upon the true construction of the statutes as applied to the "facts so stated, was I right in holding that the appeals of "Ford Motor Company of Canada, Ld., and of the Board "of Trustees of the Roman Catholic Separate Schools for the "City of Windsor, should be dismissed, the decision of the "court of revision sustained and the notice, form B, delivered "by Ford Motor Company of Canada, Ld., set aside, "vacated and declared null and void and of no effect and that "all the assessments of the company in the city of Windsor "be assessed, enrolled and rated for public school purposes, "unless it was affirmatively proved before me that the share "or proportion of the corporation's land, business or other "assessment as set out in its requisition (form B) did not bear "a greater proportion to the whole of its assessment than the "amount of the stock or shares held by Roman Catholics bore "to the whole amount of the stock or shares."

The Court of Appeal of Ontario (Middleton, Masten and Fisher JJ.A.) answered all three questions in the negative, and allowed the appeal. The Supreme Court by a majority (Rinfret, Crocket and Kerwin JJ.) dismissed the appeal to that court, agreeing that all three questions should be answered in the negative. Duff C.J. and Davis J. thought it only necessary to deal with the third question, which they would have answered in the affirmative, and as a consequence they would have allowed the appeal. The appeal is reported at [1939] S. C. R. (Can.) 412.

The Board of Education appealed.

1941. June 23, 26, 27. *Pritt K.C.* and *N. L. Spencer* (of the Ontario Bar) for the appellant board. The respondent company did not discharge the burden of proof which lay on them of showing that eighteen per cent. of their assessment was consistent with s. 66, sub-s. 3, of the Separate Schools Act. The mere fact that the company honestly, but blindly, gave a notice to the assessor did not shift the burden of proof to the appellants. The notice must be one which complies with sub-s. 3, and should be preceded by a reasonable inquiry by the company on which they can arrive at a reasonable estimate of the Roman Catholic shareholding. The statute should be construed as it stands and without regard to previous decisions, but there is a clear expression of opinion of the Supreme Court of Canada, on a very similar statute, in *Regina Public School District* v. *Gratton Separate School District* (1) which supports the argument that, if a company want the benefit of s. 66, they must first ascertain with reasonable accuracy the extent of their Roman Catholic shareholding. [Reference was also made to *In re Goderich Roman Catholic Separate School Trustees and Town of Goderich* (2) ; and to the Public Schools Act, R. S. O., 1937, c. 357, ss. 3, 4, 5 and 15 ; the Separate Schools Act, R. S. O., 1937, c. 362, ss. 55, 66 ; the Boards of Education Act, R. S. O., 1937, c. 361 ; and the Assessment Act, R. S. O., 1937, c. 272, ss. 23, 29, 30, 31, 32, 52, 73, 76 and 78. On the question of the legislature appearing to adopt the decision of the courts, see *Barras* v. *Aberdeen Steam Trawling and Fishing Co., Ld.* (3).] It was further incumbent on the respondent company to undertake the burden of proving that eighteen per cent. of their assessment was not greater than the proportion permitted them by the Act. The structure of statutory provision relating to education in Ontario is such that in general the money contributed by the respondents would be for public school purposes and if the respondents desire otherwise the burden of bringing themselves within the exception is on them. Moreover, where the facts are directly within the knowledge of one party, that is a strong indication that the burden of proof is to lie on him. The onus lay on the respondents who were seeking the benefit of a special statutory provision, and that onus was not discharged. It cannot be shifted by the insertion in a notice of a figure selected by way of guess.

N. L. Spencer, following, referred to the appointment and duties of the assessor ; the Municipal Institutions Act, R. S. O., 1937, c. 266, ss. 246, 247 ; and to s. 73 of the Assessment Act ; and dealt with the submission that the basic rule is

(1) (1915) 50 S. C. R. (Can.) 589, 606.
(2) (1922-3) 53 O. L. R. 79.
(3) [1933] A. C. 402.

that school taxes are to be applied primarily for the maintenance of public schools.

Gahan, for the respondent company. The facts found by the county court judge were prima facie evidence that the company had kept within the limits prescribed by s. 66, sub-s. 3. The resolution of the directors was adopted bona fide with due care, and affords adequate prima facie evidence of the correctness and validity of the notice given to the assessor. The assessor entered the company as a separate school supporter to the extent of eighteen per cent. of its assessments for school purposes. On the appeal against the assessment the onus was on the appellants to show that the assessment was wrong, and they failed to discharge it. It is further contended that the effect of sub-s. 4 of s. 66 is to make the directors' notice valid unless it is proved invalid, but that view does not appear to be supported by *In re J. Simpson & Sons, Ld.* (1). [Reference was made to ss. 16, 19, 22, 24, 30, 31, 32 and 52 of the Assessment Act.] On the construction of s. 66 of the Separate Schools Act, if the notice turns out to exceed the permitted percentage, there can be an adjustment by the proper procedure so as to accord with the facts. The effect of the Act is not to make the notice a nullity if there is non-compliance with the section. That would produce such startling results that the legislature could not have intended it. In the *Goderich* case (2) the company were not bound to give an exact percentage. Here the directors have expressly assented to eighteen per cent., and, if it is found that by reason of the statutory prohibition eighteen per cent. cannot take effect and that the most they can devote for special school purposes is, say, sixteen per cent., their express requirement of eighteen per cent. would justify the court in substituting the lower figure in the assessment roll. The sole test of the validity of the notice is whether the percentage of Roman Catholic shareholders is greater or less than eighteen per cent. If it is eighteen per cent. or more, the notice is valid; if it is less, the lower figure may be inserted. [Reference was made to *Roman Catholic Separate School*

---

(1) (1931) 40 O. W. N. 595.

(2) 53 O. L. R. 79.

J. C.
1941
Windsor Education Board v. Ford Motor Co. of Canada, Ld.

Trustees for Tiny v. *The King* (1), which gives the history of school legislation in Canada, and on the question of onus of proof to *Anderson Logging Co.* v. *The King* (2), and *Abrath* v. *North Eastern Railway Co.* (3).]

J. A. Kennedy (of the Ontario Bar), who appeared with *Gahan* for the respondent board of trustees, followed, and dealt with the history of the Ontario schools legislation. When three judges in the Court of Appeal for Ontario in this case, and three judges in the Supreme Court of Canada—the two dissenting judges did not discuss the *Goderich* case (4) at all—find that the legislature of Ontario, in re-enacting the schools legislation, have in effect either adopted the reasoning of Middleton J. in the *Goderich* case (4) or interpreted the meaning of the Ontario legislation as being the same as was held by Middleton J. in that case, that must be given consideration.

Pritt K.C. in reply. The court has no power to amend the percentage in the notice.

July 30. The judgment of their Lordships was delivered by Lord Atkin, who, after stating the facts and statutory provisions set out, continued: The important question raised on the appeal is on whom does the onus rest of proving that the part of the company's assessment allocated by the company's notice to separate schools does not bear a greater proportion to the whole of the assessment than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares.

In their Lordships' opinion, it is not possible [as was done by the dissenting judges in the Supreme Court] to isolate the third question propounded by the county court judge from the two preceding. Having formulated two general questions raising the issue of onus, the learned judge propounds a further question, the substance of which is whether, assuming that he was right in answering the two first questions in the affirmative, he was right in applying those answers to the present facts and holding that the company and the board of trustees had not affirmatively proved before him that the required apportionment was within the statute. Both the Chief Justice and Davis J. appear to decide that the onus is in fact on the company to support the validity of its notice, and, if this is right, there seems no good reason for not answering the first two questions in the same sense.

---

(1) [1928] A. C. 363.

(2) [1925] S. C. R. (Can.) 45, 49-50.

(3) (1883) 11 Q. B. D. 440, 445, 455, 457, 462.

(4) 53 O. L. R. 79.

In dealing with the issues raised in the case their Lordships have not derived much assistance from previous decisions on statutes dealing with similar topics but making different provisions, nor have they found it necessary to take into account the previous legislation in Ontario on the subject, with the short-lived change that was made in 1936. It seems the right course, in the circumstances, to confine themselves to the construction of the actual statute before them.

Their Lordships have come to the conclusion that all three questions should be answered in the affirmative. It is common ground in all the judgments that the normal course of assessment and rating for educational purposes is that the ratepayer is rated for public schools purposes. A statutory exception is made in favour of separate schools, but, to avail themselves of the statutory protection consisting of immunity from the ordinary liability and subjection to the extraordinary, the supporters of separate schools must establish their right to the statutory privilege. This appears the more obvious because, difficult as it may be to establish the facts defining the privilege, the facts, such as they are, are entirely within the knowledge or means of knowledge of those claiming the privilege, and not at all within the knowledge or means of knowledge of those responsible for the public schools. But the difficulties, such as they are, are not as great as stated by the Court of Appeal and the majority of the Supreme Court, consideration of which seems to have influenced their final decision.

Before 1913 a company, in the statutory provisions corresponding to s. 66, could only give a notice of apportionment which corresponded exactly to—" bore the same ratio " as—the number of shares held by Roman Catholics bore to the whole

J. C.
1941
WINDSOR EDUCATION BOARD
v.
FORD MOTOR CO. OF CANADA, LD.

amount of shares in the company. This clearly involved ascertaining at some time the precise number of shares held by Roman Catholics, and in the case of large companies whose shares are held throughout the world, must have involved an impossible task. The present provision, as it has been since 1913, is that the required apportionment to separate schools must not be of a greater proportion than Roman Catholic shares bear to the total share capital. It is true that the statutory apportionment has still to be measured by a given ratio, and that the smaller figure must be ascertained to ensure that the statutory apportionment is no greater than it, but under the present code the smaller figure need by no means represent the exact figure of Roman Catholic shareholders. The total may be much larger. All that is required is proof that at least the smaller figure represents accurately a Roman Catholic shareholding. The company is not bound to apportion up to even a well-ascertained figure. They may decide to give less than the ascertained figure, and, without knowing what the precise numbers are, they may be able to know and, if called on, to prove that the minimum figure is at least *x*, and that their apportionment in favour of separate schools is no greater than *x*. There need be no difficulty in ascertaining this minimum figure. Some holdings may be known to be those of Roman Catholics. These, at least, form a measure of the desired ratio. There may also be facts from which the reasonable inference is that some holdings in excess of those actually known would be those of Roman Catholics ; e.g., having ascertained five per cent., it may be easy to support an inference that, at any rate, there are, say two per cent., more. In this connection it must be remembered that we are within the realm of legal proof, which does not require certainty, but such a measure of probability derived from ascertained facts as to entitle the judicial mind reasonably to infer the fact in issue. With respect, therefore, it was inaccurate, as in the judgment of the Court of Appeal, to suggest that the contention of the Board of Education assumed that it was a sine qua non that the companies should state positively and absolutely the exact percentage of their shareholders who are Roman Catholics, and, as in the judgment of Kerwin J., to say that the construction of the statute then suggested on behalf of the respondent company required the company to do the very same thing as in the legislation prior to 1913, namely, to ascertain the precise ratio of the holdings of Roman Catholics. As has been pointed out, all that is required is that the company should prove at least a minimum figure of Roman Catholic holdings, and that the ratio required by the notice does not exceed the proportion of holdings measured by that figure.

Two other matters raised in the excellent argument of Mr. Gahan for the repondents require short notice. It was urged that the provisions of sub-s. 4 of s. 66 have the effect of making the directors' notice valid unless, at least, it is proved to be invalid. But this construction of the sub-section would lead to impossible results. The notice, says the sub-section, is sufficient, and remains in force until withdrawn, varied or cancelled by another notice of the company. If this were literally construed no appeal against an invalid notice would be of any avail until the directors chose to correct their mistake. But the right of appeal is conceded, with the consequence that the notice may be found to be invalid for requiring too great a proportion. Sub-sect. 4 will not avail. The sub-section can only affect the notice until challenged on appeal, and it appears to have no bearing on the question of onus on such appeal, which is determined by the considerations already stated.

The other question raised in argument was whether there existed any powers of amending an assessment by reference to the true ratio when ascertained. The answer would appear to be that the apportionment must be the result of the company's own determination as provided by s. 66, sub-s. 1. It by no means follows that if, for instance, the company decided on a fifteen per cent. apportionment, on the footing that fifteen per cent. was the proportion of Roman Catholic shareholders, they would make an apportionment of ten per cent. if that were discovered to be the true figure. They might, or they might not, but it would be for them to decide.

J. C.
1941
WINDSOR EDUCATION BOARD v. FORD MOTOR CO. OF CANADA, LD.

The appeal tribunals could not make the necessary apportionment. The company would have to make a fresh apportionment and give a fresh notice. Whether this could be done in time to make an effective apportionment for the year of assessment in dispute was not discussed, and is not, therefore, considered.

The Chief Justice struck at the notice at an earlier stage than would appear to have been under discussion before the county court judge. He considered that the statute contemplated a notice only given after the company has ascertained as a fact that the apportionment is not greater than the proportion defined by the statute, and that in the present case the company had not before them any substantial foundation for the conclusion of fact which was the essential condition of a valid notice. This makes the ascertainment by the company of the statutory proportion a condition precedent to the validity of their notice. It is an attractive proposition, and, like all opinions expressed by the Chief Justice, demands careful consideration. It appears, however, to be weakened by the apparent concession at the end of the judgment that it would still be open to the company before the revision court to establish that the statutory conditions did in fact exist, which brings us back again to the question of onus.

On the whole, their Lordships feel bound to decide the case solely by reference to the question put in the special case. They will humbly advise His Majesty that the appeal be allowed, that the orders of the Court of Appeal be set aside, and that it be ordered that the answers to questions 1, 2 and 3 should be in the affirmative. The respondents must pay the costs of the appeals to the Court of Appeal, and to the Supreme Court. As regards, however, the costs of the appeal to His Majesty in Council, in accordance with the terms of the Order in Council granting special leave to appeal, one set of the respondents' costs must be paid by the appellant.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for both respondents: *Blake & Redden.*

END OF VOL. AND OF APPELLATE SERIES FOR 1941.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1941, will be as follows:—

In the First Series,
[1941] Ch.

In the Second Series,
[1941] 1 K. B. [1941] 2 K. B. [1941] P.

In the Third Series,
[1941] A. C.

INDEX.

CANADA (BRITISH COLUMBIA) — *Insurance (Marine) — Cargo of rice — Damaged by heat caused by closing of ventilation during voyage—Closing of ventilators the proximate cause of the damage—Weather and sea while ventilators closed such as to constitute a "peril of the sea"—Loss due to peril of the sea—Marine Insurance Act, R. S. B. C., 1936, c. 134, s. 57; Sched., Rule 7—Inference of fact by Appeal Court—Rules of the Supreme Court, Order* LVIII., *r.* 4.
Canada Rice Mills, Ld. *v.* Union Marine and General Insurance Co., Ld. **J. C. 55**

CANADA (ONTARIO)—*Contract—Principal and agent—Agent liable as well as principal—Crown—Agent—Description—Interest—Payment—Possession of subject-matter before payment of purchase price.*
International Railway Co. *v.* Niagara Parks Commission - - **J. C. 328**

2. —— *Rates — Education — Assessment for separate schools purposes—Compliance with statutory requirements—Onus of proof—Amendment of assessment—Power of appeal tribunals—Separate Schools Act, R. S. O., 1937, c. 362, s. 66, sub-ss. 1, 3—Construction.*
Windsor Education Board *v.* Ford Motor Co. of Canada, Ld. - **J. C. 453**

COMPANY—Hong Kong—Foreign company—Branch in colony—Dissolution of company in country of incorporation—Jurisdiction of colonial court to wind up branch.
See Hong Kong.

CONTRACT — Palestine — Sale of land — Breach — Liquidated damages — Penalty — Unenforceable — Introduction of English rules.
See Palestine.

CONTRACT—*continued.*

2. —— Principal and agent — Agent liable as well as principal—Crown agent—Description.
See Canada (Ontario).

3. —— Sale of goods — Stipulation that part of price to be "on hire-purchase "terms"—Term too vague to constitute concluded contract.
See Sale of Goods.

CONVERSION — *Alternative remedies in contract and tort — Writ issued in contract against one defendant, but action discontinued —Whether a bar against another defendant.*
United Australia, Ld. *v*, Barclays Bank, Ld. - - - - **H. L. (E.) 1**

COPYRIGHT — *Infringement — Sketches and drawings—Comic figure as central feature—Publication in American and Canadian newspapers over series of years — Licences granted to make and sell dolls and toys representing figure—Registrable design—Similar dolls imported and sold without consent of copyright owners—Reproduction in three dimensions of substantial part of original work — Copy of licensee's doll—No loss by copyright owner of right to prevent reproduction—Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 1; 22, *sub-s.* 1—*Patents and Designs Acts,* 1907 *to* 1932.
King Features Syndicate, Inc. *v.* O. and M. Kleeman, Ld. - - **H. L. (E.) 417**

CROWN—Agent—Description.
See Canada (Ontario).

DAMAGES — Contract — Palestine — Liquidated damages — Penalty — Unenforceable — Introduction of English rules.
See Palestine.

2. —— *Negligence — Death of injured child—Shortening of expectation of life.*
Benham *v.* Gambling - **H. L. (E.) 157**

EDUCATION—Managers of non-provided elementary school — Exhibition of pupils' work on school premises—Invitee injured by collapse of floor — Managers a "public "authority" — Action not commenced within six months.
See Public Authorities Protection.

2. —— Rates — Canada (Ontario) — Assessment for separate schools purposes — Compliance with statutory requirements—Onus of proof—Amendment of assessment—Power of appeal tribunals.
See Canada (Ontario).

FALSE IMPRISONMENT — *Harbouring uncustomed goods — " Offender " — Suspected offender—Customs Consolidation Act,* 1876 (39 & 40 *Vict. c.* 36), *s.* 186.
Barnard *v.* Gorman **H. L. (E.) 378**

FAMILY PROVISION — New Zealand — Devise in will in fulfilment of contract inter vivos — Power of court to redistribute estate—Discretion.
See New Zealand.

FOREIGN JURISDICTION — Treaty — Native State—Cession of sovereign rights—Recognition of pre-treaty proprietorial rights in land — Principle applicable — Government occupation of land—Act of State—No recourse to municipal courts.
See India.

HONG KONG — *Company — Foreign company—Branch in colony—Dissolution of company in country of incorporation — Jurisdiction of colonial court to wind up branch—Companies Ordinance* (*No.* 39 *of* 1932), *s.* 313, *sub-s.* 2.
Dairen Kisen Kabushiki Kaisha and Others *v.* Shiang Kee (otherwise known as the China Merchants Steam Navigation Co., Ld.) - - - **J. C. 373**

INDIA — *Foreign jurisdiction — Treaty — Native State—Cession of sovereign rights—Effect on pre-treaty proprietorial rights in land—Foreign Jurisdiction Act,* 1890 (53 & 54 *Vict. c.* 37), *s.* 1.
Secretary of State *v.* Sardar Rustam Khan and Others - - **J. C. 356**

INSURANCE (MARINE).
See Canada (British Columbia).

INTEREST—Liability to pay — Contract — Possession of subject-matter before payment of purchase price.
See Canada (Ontario).

JAMAICA—*Negligence—Personal injury — Liability of municipal corporation—Protective legislation — Construction — Jurisdiction of Court of Appeal to correct answer of jury—Public Health Law* (*No.* 18 *of* 1925), *s.* 89, *sub-ss.* 1, 2—*Kingston and St. Andrew Corporation Law* (*No.* 12 *of* 1931), *s.* 223.
Hall *v.* Kingston and St. Andrew Corporation - - - **J. C. 284**

LAND DRAINAGE.
See Water.

LANDLORD AND TENANT — *Arrears of rent—Distress for rates under justice's warrant —" Execution " — Priority — Landlord and Tenant Act,* 1709 (8 *Anne, c.* 14), *s.* 1—*Distress for Rates Act,* 1840 (12 & 13 *Vict. c.* 14), *s.* 1.
Potts *v.* Hickman - **H. L. (E.) 212**

LIMITATION OF ACTIONS.
See Public Authorities Protection.

NEGLIGENCE—Damages—Death of injured child — Shortening of expectation of life.
See Damages.

2. —— Jamaica — Personal injury — Liability of municipal corporation—Protective legislation — Construction.
See Jamaica.

NEW ZEALAND — *Family provision — Devise in will in fulfilment of contract inter vivos — Power of court to redistribute estate — Discretion—Family Protection Act* (*No.* 60 *of* 1908), *s.* 33, *sub-s.* 1.
Dillon *v.* Public Trustee of New Zealand and Others - **J. C. 294**

2. —— *Native lands—Legislation imposing a charge—Constitutional validity—Enforcement of treaty rights—Principle applicable—Court bound by legislative enactments—Treaty of Waitangi,* 1840, *arts.* 1, 2—*New Zealand Constitution Act,* 1852 (15 & 16 *Vict. c.* 72), *s.* 73 — *Establishment and Government of Provinces in New Zealand Act,* 1862 (25 & 26 *Vict. c.* 48), *s.* 8—*Native Purposes Act,* 1935 (*of N. Z.*), *s.* 14.
Hoani Te Heuheu Tukino *v.* Aotea District Maori Land Board - **J. C. 308**

PALESTINE — *Contract — Sale of land — Breach — Liquidated damages — Penalty — Unenforceable—Introduction of English rules —Ottoman Code of Civil Procedure, arts.* 111, 112 — *Construction — Palestine Order in Council, No.* 1282 *of* 1922, *s.* 46—*Application.*
Michel Habib Raji Ayoub and Others *v.* Sheikh Suleiman el Taji el Farouqi **J. C. 274**

2. —— *Land registration—Rectification of new register—Onus of proof—Land* (*Settlement of Title*) *Ordinance,* 1928-39, *ss.* 43, 66.
Heirs of Prince Mohamed Selim *v.* Attorney-General for Palestine **J. C. 350**

PALESTINE—*continued.*

3. —— *Succession — Lebanese subject — Mulk land—Devolution—" National law of " the deceased "—Law of the situation of the land—Palestine law applicable—Ottoman law —Palestine Order in Council, No.* 1282 *of* 1922, *arts.* 46, 51, 58, 59, 64—*Succession Ordinance,* 1923 (*c.* 135 *of the Laws of Palestine,* 1933), *ss.* 2, 3, 4, 11.
JABER ELIAS KOTIA *v.* KATR BINT JIRYES NAHAS - - - - **J. C. 403**

PRINCIPAL AND AGENT — *Commission — Agent to receive commission if he effects sale— Right of principal to sell.*
LUXOR (EASTBOURNE), LD. AND OTHERS *v.* COOPER - - - **H. L. (E.) 108**

2. —— Contract — Agent liable as well as principal — Crown agent — Description.
See CANADA (ONTARIO).

PUBLIC AUTHORITIES PROTECTION — *Limitation of time for bringing action — Managers of non-provided elementary school— Exhibition of pupils' work on school premises —Invitee injured by collapse of floor — Managers a " public authority " — Action not commenced within six months — Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1.
GRIFFITHS AND ANOTHER *v.* SMITH AND OTHERS - - - **H. L. (E.) 170**

RATES—Distress under justice's warrant— " Execution "—Priority.
See LANDLORD AND TENANT.

2. —— Education — Canada (Ontario) — Assessment for separate schools purposes — Compliance with statutory requirements—Onus of proof— Amendment of assessment—Power of appeal tribunals.
See CANADA (ONTARIO).

SALE OF GOODS—*Stipulation that part of price to be " on hire-purchase terms " — Term too vague to constitute concluded contract.*
G. SCAMMELL AND NEPHEW, LD. *v.* H. C. AND J. G. OUSTON - - **H. L. (E.) 251**

WATER—*Land drainage — Breach in wall on bank of tidal river—Damage to adjoining pasture land by flooding—Catchment board empowered, but not obliged, to repair breach— Repair undertaken but unnecessary delay in performance — Corresponding increase of damage to land — Liability of board to landowner — Land Drainage Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *ss.* 34, 81.
EAST SUFFOLK RIVERS CATCHMENT BOARD *v.* KENT AND ANOTHER - **H. L. (E.) 74**

WORDS :—

—— " Execution " : POTTS *v.* HICKMAN **H. L. (E.) 212**

—— " Offender " : BARNARD *v.* GORMAN **H. L. (E.) 378**

PRINTED BY WATERLOW & SONS LIMITED, LONDON WALL, LONDON, E.C.2.

THE

LAW REPORTS.

Under the Superintendence and Control of the

ICORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES

APPEAL CASES.

1941.—A.C.

(p. 1 to p. 73.)

PART I.—FEBRUARY.

TABLE OF CASES.

APPEAL CASES.

		PAGE
CANADA RICE MILLS, LD. *v.* UNION MARINE AND GENERAL INSURANCE CO., LD.	P. C.	55
UNITED AUSTRALIA, LD. *v.* BARCLAYS BANK, LD.	H. L. (E.)	1

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.
[*For Names of Editors and Reporters, see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 13, SERJEANTS' INN,
TEMPLE, LONDON, E.C.4,
AND
PRINTED BY WATERLOW & SONS LIMITED, LONDON WALL, LONDON E.C.2.

"THE LAW REPORTS, 1941," for February consist of:—

Chancery Division	Part II.
King's Bench and Probate Divisions	Part II.
Appeal Cases	Part I.

EDITOR—RALPH SUTTON, K.C.

ASSISTANT EDITOR—G. F. L. BRIDGMAN, *Barrister-at-Law.*

ASSISTANT EDITOR (CURRENT DIGEST)—J. S. HENDERSON, *Barrister-at-Law.*

ASSISTANT EDITORS (WEEKLY NOTES) { F. PORTER FAUSSET, F. H. COWPER, } *Barristers-at-Law.*

REPORTERS:

House of Lords	J. S. HENDERSON,	*Barrister-at-Law.*
Privy Council	CHARLES CLAYTON,	*Barrister-at-Law.*
Court of Appeal, No. 1 ...	H. C. GARSIA, P. J. BOLAND,	*Barristers-at-Law.*
Chancery Division... ...	J. L. DENISON, H. LANGFORD LEWIS, K. R. A. HART, F. H. COWPER,	*Barristers-at-Law.*
Court of Appeal, No. 2 ... **King's Bench Division** ... **Court of Criminal Appeal, and Railway and Canal Commission Cases** ...	R. F. STUBBING, W. L. L. BELL, F. PORTER FAUSSET, G. F. L. BRIDGMAN, J. W. HALL, A. W. GRANT,	*Barristers-at-Law.*
Probate and Divorce ...	WM. LATEY,	*Barrister-at-Law.*
Admiralty Cases	E. C. M. TREHERN,	*Barrister-at-Law.*
Ecclesiastical Cases ...	W. L. L. BELL,	*Barrister-at-Law.*

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

SPECIAL NOTICE.

The **LORD CHANCELLOR** has informed the Council that their work is of **NATIONAL IMPORTANCE.** Therefore the production and publication of the **LAW REPORTS** must be continued.

The Report of the Law Reporting Committee published in March, 1940, states, on page 18 :—

“ At present there is free competition in the market, and it is natural that all legitimate methods should be used by competing publishers to advertise their wares. To this no objection can be taken. But we would record our opinion that the “ Law Reports ” are in merit pre-eminent and, since they get no public subsidy, it is the obligation of the legal profession to ensure that they are adequately supported ”

Subscribers are invited to assist the Council by continuing their subscriptions throughout the war, even when temporarily employed in other than legal work. Restriction of paper limits the number of copies of the **LAW REPORTS** to be printed, therefore those who cease to subscribe may be unable later to obtain copies published during the war. The Council are prepared to retain copies for those who have paid their subscriptions and to deliver the copies later as and when instructed.

THE LAW REPORTS, 1941.

(In which the reports of all judgments are revised by the Judges concerned.)

The Entire Series, Unbound. Thick or Thin-paper Editions

(with which are presented the Statutes, Weekly Notes, and Complete Current Digest).
Delivered as issued, Carriage Paid.

The Subscription List is now closed and the prepaid price is

£6 16s. 0d.

No issues of the publications will be delivered until the subscription has been paid.

COMMUNICATIONS should be addressed to
THE SECRETARY, COUNCIL OF LAW REPORTING,
13, Serjeants' Inn, Temple, London, E.C.4.

Letters in reference to *Cases*, should give name of Case, Court and Date of Hearing, and be addressed to the Editor at the above address.

PRICES OF THE ONLY PUBLICATIONS OF THE COUNCIL.

		£	s.	d.
THE LAW REPORTS, 1941, with which are presented the *Weekly Notes, Statutes* and *Current Digest*	Subscription rate (unbound)	6	16	0
CONSOLIDATED DIGEST, 1865-1890 (a Digest of cases reported in the Law Reports) (in cloth)		4	4	0
DECENNIAL DIGEST, 1891-1900 (ditto)	(in cloth)	2	2	0
DECENNIAL DIGEST, 1901-1910 (ditto)	(in cloth)	2	2	0
DECENNIAL DIGEST, 1911-1920 (a Digest of cases reported in the Law Reports and other Series)	(in cloth)	4	4	0
DECENNIAL DIGEST, 1921-1930 (ditto)	(in cloth)	4	4	0
CURRENT DIGEST, 1941 (ditto) **Issued quarterly**	(unbound)	1	1	0
WEEKLY NOTES, 1941	(unbound)	1	10	0
INDIAN APPEALS, 1941	(unbound)	1	1	0
INDIAN APPEALS DIGEST, 1872-1923	(in cloth)	2	2	0

The back Years of the *Law Reports,* since 1890, and of the *Indian Appeals,* since 1930, may be obtained on application to the Secretary. The *Weekly Notes,* 1891-1930, and the *Law Reports,* 1918-1921, are out of print.

BINDING.

Kindly note the increased charges stated below.

The Council are the only official binders of their publications, and they employ no agents in their binding business. The Secretary will be pleased to give estimates for bindings in special styles desired by subscribers.

LAW REPORTS.

	Ordinary Edition. s.	d.	Thin Edition. s.	d.	
Cloth	6	3	7	9	per Vol.
Buckram ..	7	9	9	6	”
Half-Calf ..	9	0	11	0	”
Half-Morocco ..	11	0	12	6	”
Calf	12	9	14	6	”
Full Morocco (Limp)	—		19	0	”

WEEKLY NOTES.

	Notes of Cases. s.	d.	Notes of Cases and Miscellaneous. s.	d.
Cloth	6	9	7	0
Buckram	9	0	9	6
Half-Calf	11	3	11	9
Half-Morocco ..	12	0	12	3
Calf	15	3	16	3

The *Law Reports* and *Statutes* for 1940 consist of 6 Volumes. In the thin-paper edition these may be bound as 4 Volumes.

Unbound parts should be sent, carriage paid, to 13, Serjeants' Inn, Temple, London, E.C.4, as soon as the volumes are complete. Any undue delay in this respect may necessitate an extra charge being made. Unbound parts will be collected, upon request, within a two mile area of the Law Courts, free of charge.

When the Subscriber's address is not more than two miles from the Law Courts no charge will be made for the cost of carriage of bound volumes for the year, beyond that distance but within the London Area 1s. 9d., outside that area but within the United Kingdom (including Northern Ireland) 4s. (Thin Edition 2s.), elsewhere the full cost will be charged.

All sums payable to the Council must be prepaid.

Cheques and Money Orders should be remitted direct to the Secretary and should be made payable to the “ Council of Law Reporting ” and crossed.

Banker's Commission must be added to the amount of the Subscription in the case of every remittance from Ireland, Scotland, the Isle of Man, and the Channel Islands. Remittances from abroad must be made payable in London.

Now Published

WAR DAMAGE PRECEDENTS

Being the

LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939

Fully Annotated with

A COMPLETE SET OF FORMS OF NOTICES
AND APPLICATIONS TO THE COURT
UNDER THE ACT

By
S. P. J. MERLIN,
of Gray's Inn and the Middle Temple, Barrister-at-Law

Assisted by
WILLARD SEXTON,
of the Middle Temple, Barrister-at-Law

Price 10s. 6d., plus 7d. postage

BUTTERWORTH & CO. (Publishers) LTD.,
Bell Yard - Temple Bar - London, W.C.2

UL 14 SEP 1971